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## Argument:

The proviso to Section 8 (3) of the National Labor Relations Act does not give an employer the unqualified right to discharge employees at the demand of the contracting union pursuant to a closed-shop agreement where, to the employer's knowledge, the contracting union's purpose is to punish employees for engaging in activity on behalf of a rival union, carried on during a period when it is lawful and proper for the employees to seek a redetermination of representatives.....

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# **In the Supreme Court of the United States**

**OCTOBER TERM, 1949**

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**No. 47**

**COLGATE-PALMOLIVE-PEET COMPANY, PETITIONER**  
**v.**

**NATIONAL LABOR RELATIONS BOARD, INTERNATIONAL CHEMICAL WORKERS UNION, A. F. L., ET AL., AND WAREHOUSE UNION LOCAL 6, INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION (C. I. O.)**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD**

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## **OPINIONS BELOW**

The opinion of the court below (R. IV, 990-992), is reported in 171 F. 2d 956. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. I, 68-85) are reported in 70 N. L. R. B. 1202.

## **JURISDICTION**

The decree of the court below (R. IV, 993-996) was entered on January 13, 1949. The Com-

pany's petition for rehearing was denied February 4, 1949 (R. IV, 997). The Company's petition for a writ of certiorari was filed on April 4, 1949, and was granted on May 31, 1949, "limited to the question of the construction of Section 8 (3) of the National Labor Relations Act of 1935 (49 Stat. 449, 29 U. S. C., Sec. 158 (3)) in relation to this case" (337 U. S. 913).<sup>1</sup> The jurisdiction of this Court is invoked under Section 1254 of 28 U. S. C., and Section 10 (e) and (f) of the National Labor Relations Act, as amended.

#### QUESTION PRESENTED

The Labor Board found that an employer having a closed-shop agreement with a union discharged certain employees at the Union's demand; that the employer knew that the Union's purpose was to punish these employees for engaging in activities on behalf of a rival union; and that such activities were carried on by the employees during a period when it was lawful and proper for them to do so. The question presented is whether, notwithstanding these findings, the Board is precluded by the proviso to Section 8 (3) of the National Labor Relations Act of 1935

<sup>1</sup> At the same time the Court denied the petition for a writ of certiorari filed by Warehouse Union Local 6, International Longshoremen's & Warehousemen's Union (CIO), which sought to raise other questions in connection with this case. *Warehouse Union Local 6, International Longshoremen's and Warehousemen's Union (CIO) v. National Labor Relations Board, et al.*, October Term, 1948, No. 695, 337 U. S. 915.

from finding the employer to have committed an unfair labor practice.

#### STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act of 1935 (49 Stat. 449, 28 U. S. C. 151, *et seq.*) and of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. II, 141 *et seq.*) are set forth in the Appendix, *infra*, pp. 111-119.

#### STATEMENT

Upon a second amended charge (R. I, 1-4), duly filed by the International Chemical Workers Union, A. F. L., herein called the A. F. L., the Board on January 18, 1946, issued its complaint alleging, among other things, that Colgate-Palmolive-Peet Company, herein called the employer, had discharged and refused to reemploy thirty-eight named employees because of their activity on behalf of the A. F. L. and a predecessor labor organization, Colgate-Palmolive-Peet Employees' Welfare Association (R. I, 7-8, 4-10). The employer filed an answer averring, among other things, that these employees had been discharged pursuant to a valid closed-shop agreement with Warehouse Union Local 6, International Longshoremen's & Warehousemen's Union (CIO), herein called the C. I. O.; and that the discharges have been made at the request of the C. I. O. upon its representation that the employees had been suspended by it and were no longer members

in good standing (R. I, 11-14, 10-15). A hearing upon the complaint, in which the A. F. L. and C. I. O. participated, was held before a trial examiner of the Board from February 4 to 8, 1946 (R. I, 21). On March 27, 1946, the trial examiner issued his intermediate report (R. I, 17-68). On September 6, 1946, the Board issued its decision and order (R. I, 68-85). The pertinent facts, as found by the Board and as shown by the evidence, may be summarized as follows:<sup>2</sup>

# I

## THE BOARD'S FINDINGS OF FACT

### A. THE CLOSED-SHOP AGREEMENT BETWEEN THE EMPLOYER AND THE C. I. O.

On July 9, 1941, the employer and the C. I. O. entered into a contract covering the production and maintenance employees at the employer's plant in Berkeley, California. This contract contained the usual terms of a collective agreement, and provided that it was to "remain in effect unless and until changes become necessary because of conditions beyond the control of the Company or are requested by the employees through their representatives" (R. I, 69, 23-25; R. III, 788). Section 3 of the agreement required that new employees be hired through the offices of the C. I. O., or, in the event that the

<sup>2</sup> In the following statement, record references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

C. I. O. was "unable to furnish competent workers", that new employees apply for membership in the C. I. O. within fifteen days of their employment; and it further required as a condition of employment that employees "be members in good standing" of the C. I. O. (R. I, 69, 24; R. III, 787-788, R. I, 223). On July 24, 1945, a supplemental agreement was entered into which extended the 1941 contract by providing that it should "remain in full force and effect" pending the approval or disapproval by the Tenth Regional War Labor Board of certain changes (R. I, 69; 25; R. III, 788-789, R. I, 223).

The C. I. O. local admitted to membership employees of other employers (R. I, 26, n. 5; R. I, 187). None of its officers was an employee of the Colgate-Palmolive-Peet Company and the day-to-day administration of its contract with the Company was handled by five plant stewards who were employees and who were elected for that purpose by their fellow-employees (R. I, 218-220, 286). In July 1945 the five C. I. O. plant stewards were Haynes, Luchsinger, Marshall, Moreau, and Smith (R. I, 26; R. I, 193).

#### B. THE EMPLOYEES' DISSATISFACTION WITH THE C. I. O. AND THE PRELIMINARY STEPS TAKEN BY THEM TO CHANGE REPRESENTATIVES

Dissatisfaction with the representation accorded them by the C. I. O. had been brewing among the employees for about six months before the extension of the closed-shop agreement (R. I,

25; R. I, 225-226, 209).<sup>3</sup> During this period, the five plant stewards expressed their discontent with the C. I. O. officials to Charles Wood, the employer's Labor Relations Director (R. III, 758-759). On July 20, 1945, four days before the collective agreement was extended Steward Marshall in a conversation with B. W. Railey, the employer's vice-president (R. I, 181), asked that the five stewards be present when the extension was signed because of impending labor troubles at the plant due to the employees' unrest (R. I, 188-189, 225-226).

Some time in July, the five C. I. O. stewards communicated with District 50 of the United Mine

<sup>3</sup> Judged by the ensuing campaign literature of the employees who sought to displace the C. I. O. as their bargaining representative, their dissatisfaction with the C. I. O. stemmed from their belief that the wage rates were too low (R. III, 813, 828, 836-837, 842, R. II, 391-394); that a vacation issue had been inadequately processed (R. III, 811); that seniority was ignored (R. III, 832-833); that sick and death benefits were maladministered (R. III, 838-839); that shift differential pay and free meals for overtime work had not been obtained (R. III, 842); that equal pay for equal work for women had not been procured (R. III, 823, 828, 829, 837); that an insufficient back pay award had been secured for shift workers and women (R. III, 828-829); that dues were too high (R. III, 819, 824, 838, 839); that there was too little responsiveness by officers to employees' wishes, too little local autonomy in the plant, and too little control by employees over meetings and union affairs (R. III, 809-810, 820-821, 822, 838, 840). The dissatisfied employees vehemently denied that their proposed union discriminated against Negroes, accusing the C. I. O. of injecting a racial issue into the campaign as a devisive tactic (R. III, 808-809, 811-812, 824, 826, 827, 831, 836, 841, 844).

Workers of America and discussed with its representatives the possibility of transferring the affiliation of the Company's employees to that organization (R. I, 25-26; 190, 209, 237-240). On July 26, 1945, the five C. I. O. stewards, for the purpose of organizing employee sentiment into effective action in opposition to the C. I. O., arranged a dinner at which twenty-four other employees were also present (R. I, 26; R. I, 189-191, 208-210, 255). At this dinner it was decided to call an open meeting on July 30, 1945, for the employees at large, to discuss a change in bargaining representatives to be undertaken initially by the formation of a temporary organization known as the Employees Welfare Association (R. I, 26; R. I, 189-191, 208-210, 255).

On July 28, 1945, a "notice of meeting" was posted on the bulletin boards throughout the plant inviting "all those interested in joining Employees Welfare Association" to be present at a neighboring meeting hall "at 4: 15 p. m., Monday, July 30, 1945" (R. I, 69, 27; R. I, 191-192, 255-256). On the same day, Superintendent Altman knew of the posting and, upon receiving a telephone call from Labor Relations Director Wood asking "if anything unusual had happened," discussed the notice with him (R. III, 667-668, R. I, 255-256). Thereafter Steward Luchsinger and employee Olsen visited Superintendent Altman at his office, and obtained Altman's agreement to shut down the plant for two hours so that the night shift em-

employees could attend the meeting (R. I, 69-70, n. 2; R. I, 268-269). The Board concluded that the employer would not have authorized so important an interruption in the plant's operations without ascertaining the purpose of the meeting (R. I, 69-70, 77).

**C. THE EMPLOYER, KNOWING THE C. I. O.'S DISCRIMINATORY PURPOSE, ACCEDES TO THE C. I. O.'S REQUEST TO DISCHARGE THE STEWARDS AND THE COMMITTEEMEN FOR THEIR LEADERSHIP OF THE RIVAL UNION ACTIVITIES**

On July 30, 1945, the same day for which the rival organizational meeting was scheduled, the C. I. O. requested and obtained the discharge of the five stewards who were leading the employees' organizational efforts (R. I, 70, 29; R. III, 806-807, R. II, 654-656). In the early afternoon of that day, four C. I. O. officials, who were not employees of the Company, called upon Superintendent Altman at his office (R. I, 27; R. III, 667). The C. I. O. officials handed Superintendent Altman a letter which requested the discharge of the five duly-elected plant stewards, including Steward Luchsinger who had obtained Altman's agreement to shut down the plant. The letter stated "that charges have been preferred" against these employees "and that they have been suspended from membership" in the C. I. O. "pending a trial" (R. I, 27-28; R. III, 668-669, 784-785, R. I, 259, 256). Superintendent Altman hurried to Vice President Railey's office (R. III, 669). The two returned to Altman's office (R.

II, 522, R. III, 669), and the five stewards were summoned (R. III, 670, R. II, 524). Vice-President Railey thereupon discharged the stewards, informing them that under the terms of the closed-shop agreement he was obliged upon demand to terminate their employment until they were restored to good standing by the C. I. O. (R. I, 70, 29; R. I, 194, 256-257, 288-289). Each of the stewards was given a letter by the C. I. O. officials (R. I, 29; R. II, 525, 670, R. I, 193). The stewards thereupon left Altman's office (R. I, 29; R. I, 195, R. II, 525, R. III, 670-671). The letters notified the stewards that they were suspended from membership in the C. I. O. pending a union trial upon unspecified charges alleging the violation of the C. I. O.'s Declaration of Principles, Oath of Membership, and Article 9, Section 1 of the C. I. O. Constitution and By-Laws (R. I, 70; R. III, 847-848, R. I, 229, R. III, 853-856, R. II, 617).

Immediately following the discharge of the five stewards, the C. I. O. representative distributed throughout the plant a bulletin reading (R. I, 70, 31-32; R. I, 256, R. III, 783, R. I, 259):

#### ATTENTION

#### All Ware House Union Members:

An illegal meeting has been called by certain employees of Peet's now under suspension as members of this union for violation of the membership oath, and other illegal acts.

## WARNING

Any member of Local 6 who attends such illegal meeting or participates in violations of our constitution, does so at the risk of losing membership and employment.

GENERAL EXECUTIVE BOARD,

Warehouse Union,

Local #6, I. L. W. U.

That afternoon, according to Vice President Railey, the factory was "in a state of turmoil due to the fact of a lot of conversation and visiting, and union people going through the plants, and people couldn't get their work done" (R. I, 36; R. II, 528).

Of the 313 production and maintenance employees (R. I, 61, n. 30; R. II, 421-422), more than 200 attended the scheduled anti-C. I. O. meeting (R. I, 70, 32; R. I, 196, 256). Two major decisions were made. It was unanimously resolved to break relations with the C. I. O. and to form an independent union, known as Employees Welfare Association, until affiliation with a strong international union could be accomplished (R. I, 70, 32; R. I, 196, 200-201, 261, 288, R. III, 848, R. I, 259). It was also unanimously agreed that four employees, Thompson, Sherman, Lonnberg, and Olson, designated committeemen and elected to act as officers of the interim organization, should seek the reinstatement of the discharged stewards, and that should they fail in their quest, all the employees would in protest cease working

(R. I, 70, 33; R. I, 196, 199, R. III, 849, R. I, 259). Upon the close of the meeting the four committeemen dispatched the following telegram to Vice President Railey (R. I, 70-71, 34; R. I, 257, R. III, 786-787, R. I, 259):

You are hereby notified of action taken by more than 200 employees of Colgate Palmolive Peet Co. All being former members of ILWU 1-6 and being more than 50 percent of total employees have withdrawn and severed relations with ILWU-6 as collective bargaining agent.

EMPLOYEES WELFARE ASSOCIATION,

By NEGOTIATING COMMITTEE,

E. H. THOMPSON.

WILLIAM SHERMAN.

H. LONNBERG.

L. OLSON.

A telegram of similar purport was sent to the C. I. O. (R. I, 33-34; R. I, 257, R. III, 786, R. I, 259).

On the following morning, July 31, 1945, the four committeemen called upon Vice President Railey at his office, and unsuccessfully urged the reinstatement of the five discharged stewards (R. I, 71; R. I, 257, R. II, 360-361). Railey persisted in his position that under the closed-shop agreement he had no choice but to comply with the C. I. O.'s demand (R. I, 34; R. I, 257). He was told that he would shortly receive a telegram indicating the employees' wish that the C. I. O.'s authority to act on their behalf be

terminated, and during the conversation the telegram which had been dispatched the previous evening was in fact received by Railey (R. I, 71, 35; R. II, 368-369, 377-378).

Meanwhile, Superintendent Altman joined the conference stating that a group of C. I. O. officials were presently in his office (R. I, 35; R. II, 257). They were invited into Railey's office (R. I, 35; R. II, 361, 527). An acrimonious debate ensued between Committeeman Sherman and C. I. O. President Lynden during which Lynden sought to justify the C. I. O. wage policy (R. I, 35; R. II, 545-546, 528). Vice President Railey in his testimony agreed that "it became quite apparent as this conversation took place that there was a schism developing in the ranks of the C. I. O." (R. II, 545-546). Indeed, at this very conference, the C. I. O. officials, in the presence of the employer's ranking officials, bluntly informed the four committeemen that suspension notices for three of them were already in preparation, and requested the name of the fourth one, Olson, so that they could prepare such notice for him (R. I, 71; R. I, 263-264). Later that morning the employer received a formal request from the C. I. O. notifying it of the suspension of Thompson, Sherman, Lonnberg, and Olson from membership in the C. I. O. and requesting their discharge (R. I, 71, 36-37; R. III, 673-675, 846-847).

That same morning, C. I. O. representatives circulated another bulletin among the employees at the plant (R. I, 71, 37; R. I, 257). The leaflet warned the employees against aligning themselves with "Sherman-Marshall-Lundeberg & Co.," lest they jeopardize "their own reputation, their union standing, their seniority, and their jobs," and pointedly referred them to "the provisions of the union contract, including the requirement that only members of Warehouse Union, Local #6, ILWU, in good standing may be employed by the company" (R. I, 71, 37-38; R. III, 789, R. I, 259). Despite this warning, a majority of the employees, upon learning of the refusal to reinstate the five stewards, at noon left the plant in order to hold a second anti-C. I. O. meeting (R. I, 71, 38; R. I, 257). Vice President Railey, who attended the meeting upon invitation, addressed the employees, stating that the reinstatement of the stewards was impossible because of the employer's contractual obligation under the collective agreement (R. I, 72, 38-39; R. I, 257-258, R. II, 529-531). Dissatisfied with Railey's explanation, and having failed in their effort to secure the reinstatement of the stewards, the employees in protest voted to reaffirm their resolution not to return to work (R. I, 72, 38-39; R. I, 202, 258, 266, R. III, 850-851, R. I, 259). The strike lasted two and one-half days, and most of the workers participated in it (R. I, 72, 39; R. III, 677, R. II, 533).

Two days later, on August 2, 1945, a third anti-C. I. O. meeting was held, again attended by a substantial majority of the employees, at which it was voted to dissolve Employees Welfare Association, to affiliate with International Chemical Workers Union, A. F. L., herein called the A. F. L., and to return to work the following morning pending an election among the employees to be requested of the National Labor Relations Board (R. I, 72, 40; R. I, 258, R. III, 851-852, R. I, 259). The next morning, all the employees returned to work except the five stewards, who had been previously discharged, and the four committeemen who had been told the day before by Superintendent Altman that in view of their suspension it would be futile for them to report to work (R. I, 72, 39-40; R. I, 258, 266-268, R. II, 378, R. III, 806-807, R. II, 654-656).

**D. THE EMPLOYER'S KNOWLEDGE OF THE C. I. O.'s PURPOSE OF RETALIATING AGAINST EMPLOYEES ACTIVELY SUPPORTING THE RIVAL UNION**

The initial organizational efforts of the insurgent employees culminating in the discharge of the stewards and the committeemen at the C. I. O.'s request were followed by intensified organizational efforts to which the C. I. O. retaliated with further discharge-demands under the closed-shop contract. The events preceding its accession to the C. I. O.'s demands furnished the employer with additional information apprising it of the C. I. O.'s discriminatory purpose.

Upon the completion of affiliation with the A. F. L., steps were undertaken by it to secure a change of representatives by resort to formal Board processes. On August 3, 1945, the A. F. L. filed a petition for the investigation and certification of representatives. On August 8, 1945, the A. F. L., the C. I. O., and the employer met informally to discuss the petition at a preliminary conference at the Board's regional office in San Francisco. Notice of formal hearing was issued on August 14, 1945, was received by the employer on August 17, 1945, and the hearing was held on August 22, 1945 (R. I, 72, 73, 41, 45; R. II, 549-552, R. III, 799-805.)<sup>4</sup>

In addition to the A. F. L.'s invocation of the Board's election machinery to resolve the representation question, the A. F. L. invoked the Board's processes for the redress of unfair labor practices in order to remedy the dismissal of the stewards and the committeemen. On August 13, 1945, the A. F. L. verified, and the next day filed, the original charge alleging the discriminatory dismissal of the stewards and the committeemen

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<sup>4</sup> Pursuant to the Board's Decision and Direction of Election issued on September 26, 1945, an election was held on October 16, 1945, at which the A. F. L. was defeated 181 to 126 (R. I, 75; R. II, 549-552, R. III, 799-805). Thereafter, upon objections to the election filed by the A. F. L., the election was set aside by the Board because the employer's discharge of employees at the C. I. O.'s request for protected union activities prevented the result of the election from being truly representative of the employees' untrammelled wishes (R. I, 75, 79, 83).

(R. I, 72; R. I, 92-93). Because of the Board's practice promptly to inform persons of charges filed against them, the Board inferred that the employer was apprised of this charge by August 17, 1945 (R. I, 77-78). The employer admittedly knew of it on August 22, 1945 (R. I, 107).

Upon the employer's notification on August 8, 1945, of the filing by the A. F. L. of a petition for certification of representatives, Vice President Railey agreed that it was readily apparent that a campaign for the employees' favor was being conducted by the A. F. L. and the C. I. O. (R. I, 72; R. II, 547). Labor Relations Director Wood in his daily tours of the plant was handed union literature which was being circulated in profusion throughout the plant, and he observed the A. F. L. buttons which the employees were wearing on their work clothes (R. III, 759-761). This campaign was open, widespread, and intense (R. I, 72, 41; R. I, 299-301, 305-314, 330-332, R. II, 344, 387-388, 391-394, 411-414, 430-431, 433-436, 438-439, 475-478, 481-488, 516, 564, 566, 580-581, 583-584, 592-594, 598, 607, 608-612, 631-632, 642, R. III, 785, 789-790, R. I, 259, R. III, 794-798, 808-847). The C. I. O., in the conduct of its campaign, both orally and through leaflets, made clear that the price of adherence to the A. F. L. was discharged under the closed-shop contract (R. I, 72, 77, 43-44; R. I, 299-300, 305-314, R. II, 438-439, 475, 481-488, 516, 564, 580-581, 592-594, 598, 608-609, 631-632, 642, R. III, 785, 789-790, R. I, 259, R. III,

794-798, R. II, 476-477). Aware of the C. I. O.'s retaliatory campaign, Labor Relations Director Wood conceded that he knew that the C. I. O.'s subsequent discharge demands were motivated in part at least by the "union activities" of the A. F. L. adherents (R. I, 78, 49; R. III, 737).<sup>5</sup> Illustrative of the C. I. O.'s campaign was its leaflet, widely distributed throughout the plant and posted on a plant bulletin board on August 22, 1945, the day of the hearing on the A. F. L.'s election petition, warning the employees of discharge for pro-A. F. L. or anti-C. I. O. activity (R. I, 73; R. III, 769, 798, R. II, 476-478). The leaflet read in part:

\* \* \* \* \*

6. Only members of the Warehouse Union Local 6, work at Colgate Palmolive

<sup>5</sup> It is unlikely that any notable aspect of employee thinking escaped managerial attention. In the discharge of their managerial duties, Superintendent Altman and Labor Relations Director Wood, top-ranking officials at the employer's Berkeley plant (R. I, 180-182), made daily tours of the plant (R. III, 696-697, 757-758). One of the bulletin boards upon which employees posted notices is in the immediate vicinity of the offices of the managerial staff (R. I, 191-192). Superintendent Altman passes by this bulletin board several times each day, and generally reads any new notices placed on the board (R. III, 686-687). In making his daily rounds Labor Relations Director Wood occasionally talks with the employees (R. III, 758), observes the matter placed on the various bulletin boards (R. III, 759), and during the course of the union electioneering received union literature (R. III, 759-760). Lesser supervisory officials, being in more immediate contact with the employees, necessarily have an even more intimate knowledge of employee opinion.

**Peet Company.** If anyone says different—let him test it.

7. Any Peet's employee reported as trying to get people to bolt the C. I. O. and join the A. F. L. or wearing an A. F. L. button, will be taken off the job.

\* \* \* \*

10. As a result of the investigation last week, we have found it necessary to consider the removal of several more of the ringleaders who have violated all of our rules.

\* \* \* \*

We suggest: If you value your future at Colgate Palmolive Peet; if you enjoy your present job; if you would like to retain your seniority and pension, and receive the retroactive pay due you, we advise you to think carefully about everything told you—then tell the A. F. L. disrupters that you are not interested in their form of phoney unionism.

WAREHOUSE UNION, LOCAL 6, ILWU:

The C. I. O.'s retaliatory campaign was marked by threats to individual A. F. L. adherents. On the afternoon of August 11, 1945, a C. I. O. official remonstrated with employee Albert Zulaica, subsequently discharged on September 1 under the closed-shop contract (R. I, 74; R. III, 792, 806; R. II, 654-656, *infra*, pp. 23-25), for his active advocacy of the A. F. L., warning him that such conduct by the employees would lead

to their dismissal (R. I, 41; R. I, 305-310). In reply to Zulaica's assertion that "if you start doing that you will have to throw the majority out because most of them are wearing an A. F. L. button," the C. I. O. official stated, "we don't have to do that. \* \* \* We can pick some of you out and claim that you were leaders, and that will scare the rest of them" (R. I, 42; R. I, 309-310). On the following Monday morning, August 13, 1945, Zulaica reported the gist of this conversation to his foreman asking him to talk to the superintendent or assistant superintendent about it. That afternoon Assistant Superintendent Stanberry told Zulaica "I think all your trouble is because you are wearing those buttons. If you take them off you won't have that trouble, see. You can keep that in your heart and take your buttons off. They could never take that out of your heart if you wanted to go into another union." (R. I, 73; R. I, 310-312.)

On August 31, 1945, a C. I. O. official approached employee Kay Norris in the plant (R. I, 74; R. II, 483-484). On the previous day, this C. I. O. official on plant premises had warned Norris to desist from campaigning on behalf of the A. F. L. (R. II, 480-482). Referring to this earlier conversation, the C. I. O. official asked Norris whether she "had changed \* \* \* [her] mind," that he had given her "time to go home and think it over," and was she ready to "drop

A. F. of L. and stick by C. I. O." (R. I, 74; R. II, 484). Upon being told that she had not changed her mind, he said "I held out a letter for you until today \* \* \* You are fired. You might as well get off the floor right now" (R. I, 74; R. II, 484). Norris immediately reported to Assistant Superintendent Stanberry that "that union fellow kicked me off the floor. He told me I was fired" (R. I, 74; R. II, 484, 485). Stanberry replied, "He can't do that" (R. II, 484). Norris then attempted to report the incident to Superintendent Altman, but on finding him out of his office reported it to another person in the office who told her to ignore the statement and return to work (R. I, 74; R. II, 485). As herein-after more fully related (pp. 23-25, *infra*), on the next day, September 1, Norris and seventeen others were discharged under the closed-shop contract (R. I, 74; R. III, 792, 806-807, R. II, 654-656).

**E. THE EMPLOYER, KNOWING THE C. I. O.'s RETALIATORY PURPOSE, ACCEDES TO ITS REQUEST TO DISCHARGE THE TWENTY-EIGHT ADDITIONAL EMPLOYEES FOR THEIR RIVAL UNION ACTIVITIES AND REFUSES TO REEMPLOY THE STEWARDS AND THE COMMITTEEMEN**

In addition to the discharge of the five stewards and the four committeemen, whom the employer subsequently refused to reemploy upon their request, the C. I. O. secured the dismissal of twenty-eight additional employees pursuant to the closed-shop agreement (R. I, 74; R. III, 806-807, R.

II, 654-656). All of the discharged employees had joined the A. F. L., worn A. F. L. buttons prominently in the plant, taken an active role in A. F. L. organizational activities, and participated in the two and a half days' work stoppage (R. II, 656-657, 506-507). All of them, with two exceptions,<sup>6</sup> attended the meetings of July 30, 31, and August 2, 1945, and concurred in the actions taken at these meetings (R. II, 506). Their discharge, and the refusal to reemploy the stewards and the committeemen, occurred under the following circumstances:

*1. The refusal to reemploy the stewards and the committeemen on August 17*

On August 17, 1945, the five stewards and the four committeemen reported to work, but their request for reinstatement was denied (R. I, 73; R. I, 267-268, 289-290, R. II, 341-342, 380-381, 427, R. III, 679-680, 699-700). Labor Relations Director Wood stated that "I fell back on our legal advice" and represented to the discharged employees that under the closed-shop contract the employer was under an absolute duty to abide by the C. I. O.'s wishes (R. I, 73; R. III, 727-728). They were told by Wood that "You will have to remain out until the issue has been determined between you and the C. I. O." (R. I, 73; R. III, 728).

<sup>6</sup> The complaint was dismissed insofar as it related to the third exception, Rose Gilbert (Schneider) (R. I, 74, 21).

## *2. The C. I. O. request for the discharge of seventy employees on August 30*

On August 30, 1945, a C. I. O. official visited Labor Relations Director Wood at his office and demanded the discharge of an estimated seventy employees, about one-fifth of the working force, upon the asserted ground that they were not members of the C. I. O. in good standing (R. I, 73-74; R. III, 728-731). Wood told him, "Go to hell \* \* \* I [am] \* \* \* not going to act on any such order \* \* \*. This thing has gone too far. You are getting too many people involved here. Why, the first thing you know, if this keeps on, we will be shut down \* \* \* I want to talk to [C. I. O. Vice President] Heide about this thing before we get into this thing any deeper" (R. I, 74; R. III, 730). After a discussion with Heide, this particular request was evidently withdrawn (R. I, 74; R. III, 730).

## *3. The discharge of six employees on August 31*

On the morning of August 31, 1945, the C. I. O. requested and obtained the discharge of six employees pursuant to the closed-shop agreement (R. I, 46; R. III, 806-807, R. II, 654-656). The discharges were effected in conjunction with a wholesale inspection of the employees' union dues books.<sup>1</sup> This inspection was conducted by C. I. O.

<sup>1</sup> It was stipulated at the hearing that the C. I. O. did not request the discharge of any of the stewards, the committeemen, or the twenty-eight additional employees because of

officials in the vicinity of the entrance to the plant during the time when the employees were reporting to work on the morning shift (R. I, 46; R. III, 681-682, 709-716). Superintendent Altman and Assistant Superintendent Carter were present to observe the event (R. III, 681-682, 710-711). Assistant Superintendent Carter saw the C. I. O. officials hand envelopes to some of the employees, and heard them tell these employees that they could not report to work (R. III, 715-716). One employee who received a suspension notice was told, "Here is a letter for you, and you are fired. You cannot work here anymore. \* \* \* You go to your A. F. of L. friends to help you now" (R. II, 516). Another suspended employee who received a notice was told, "take it back to your union, see if they can put you back to work, you are so crazy about them" (R. II, 564).

#### *4. The discharge of eighteen employees on September 1*

On September 1, 1945, the C. I. O. requested and obtained the discharge of eighteen more employees pursuant to the closed-shop contract (R. I, 74, 46-47; R. III, 806-807, R. II, 654-656). On that day, the C. I. O. delivered a letter to the employer stating that these eighteen employees had been suspended from membership in the delinquency in the payment of union dues to the C. I. O. (R. II, 518-519).

C. I. O. and requesting their discharge (R. I, 46-47; R. III, 792, R. I, 315, R. III, 684, R. II, 534). After a conference among the employer's officials, it was decided to call the designated employees into Vice President Railey's office to inform them that their employment was terminated (R. I, 47; R. III, 732-734, R. I, 313-316, R. II, 534-535, 567-568, 572-573, 620-621). The eighteen were called in and Labor Relations Director Wood reiterated to the assembled employees the management's position that it was under an absolute duty under its closed-shop contract to discharge them upon demand of the C. I. O. (R. I, 47; R. III, 735). A turbulent session ensued, during which employee Norris, whose discharge was requested, expressed her conviction that the employees were dismissed because "we wore A. F. of L. buttons and we distributed literature," to which Wood replied, "I guess it is so, that could be it" (R. II, 488). She further testified that Wood stated, "We talked too much, that if we had kept our mouths shut we wouldn't have got into this mess" (R. II, 488-489). Another employee testified that Wood said, "If you had kept this quiet about the AFL this wouldn't have happened to you" (R. I, 316). A third employee testified that Wood said, "If we [the discharged employees] didn't wear the AFL buttons and didn't talk too much, why, we wouldn't get in this trouble in the first place" (R. II, 577).

One of the assembled employees complained, "I don't see why we can't change from one union to another" (R. II, 492).

*5. The discharge of four employees on September 5, 7, and 11*

Several days later, four additional employees were dismissed pursuant to the closed-shop contract: employee Franklin Richmond was discharged on September 5, employees Manuel Alegre and John Perucca on September 7, and employee Edward Navarro on September 11 (R. I, 50, and n. 20; R. III, 806-807, R. II, 654-656).

About September 1, 1945, employee Franklin Richmond, while wearing an A. F. L. button on his work clothes, was approached in the plant by a C. I. O. official who demanded to see his union book (R. I, 51; R. II, 630-631). Richmond walked over to his supervisor and asked whether "this goon had any right to come in here and demand to see my book merely because I have got a button on." His superior replied, "Well, he can ask to see your book, is all." Upon receiving the union book, the C. I. O. official noted its number. Richmond stated, "Now I suppose I will get one of your letters?" He was told, "You will!" And he did. (R. I, 51-52; R. II, 631-632.) Several days thereafter Superintendent Altman informed Richmond that he was required to discharge him because he had been

named in the C. I. O. notice of suspension (R. II, 632-635). Richmond told Altman "that for every one of us that were laid off like that, for wearing those buttons, he was going to have some kind of charge placed against him" (R. II, 634).

Edward Navarro, together with three or four other machinists employed at the plant, were members of a C. I. O. union, the East Bay Union of Machinists, Local 1304, and because of their membership in the Machinists' Union all of them were permitted to work at the plant without obtaining membership in the C. I. O. local at the plant (R. I, 52; R. II, 641-642, 645-646). About September 4, 1945, Labor Relations Director Wood told Navarro that it would be necessary for him to transfer to the C. I. O. local at the plant (R. II, 642). He applied for a transfer but the C. I. O. local in the plant refused to grant it because he "was wearing an A. F. of L. button in the plant" (R. II, 642). The employer thereupon discharged him (R. I, 50, and n. 20; R. III, 806-807). The other machinists, however, were permitted to continue to work without obtaining membership in the C. I. O. local at the plant (R. II, 646).\*

\* There is no difference in principle between the refusal to qualify an employee for membership in a union because of his protected activities on behalf of a rival union and the withdrawal from an employee of his good standing in a union because of his protected activities on behalf of a rival union.

# **F. THE C. I. O.'s SUBSEQUENT TRIAL OF THE DISCHARGED EMPLOYEES**

Subsequent to their discharge, the five stewards, the four committeemen, and the twenty-eight additional employees were tried before C. I. O. tribunals. The transcripts of the proceedings before the C. I. O. tribunals and the decisions of the C. I. O. trial committees were received in evidence, not to establish the truth of the matter asserted therein for which they were incompetent hearsay, but for the limited purpose of establishing that proceedings were held and that decisions were rendered (R. III, 769-771, 778-779). On October 3, 1945, the C. I. O. tried the five stewards and the four committeemen *in absentia*, and on October 10, 1945, a decision of the trial committee was issued recommending their expulsion from the C. I. O. (R. I, 52-53; R. III, 856-866, 877-922). About mid-November 1945, the C. I. O. informed Labor Relations Director Wood of this action (R. 54; R. III, 741, 762). On December 17, 1945, the twenty-eight additional employees, with the exception of Edward Navarro, were tried by a C. I. O. tribunal (R. I, 52; R. III, 923-987). Some of these employees protested what they believed to be the irregularity of the proceeding, and forthwith withdrew from further participation in it (R. III, 924, 930-935). The remaining employees participated in the proceeding, and during its course entered a so-called "guilty" plea admitting that they engaged in the two and

a half days' work stoppage (R. II, 506-507, R. III, 969-976). On December 24, 1945, a decision of the trial committee was issued recommending that the employees who withdrew from the proceeding be expelled and that the employees who pleaded "guilty" be placed on probationary status (R. I, 53-54; R. III, 867-876). About January 1, 1946, the C. I. O. informed Labor Relations Director Wood of this action (R. I, 54; R. III, 742, 762).<sup>\*</sup>

## II

### THE BOARD'S CONCLUSIONS OF LAW

The Board found the closed-shop agreement to have been validly entered into in conformity with the proviso to Section 8 (3) of the Act (R. I, 69). The Board concluded, however, that, by virtue of the indefinite term of the contract, which had run for more than four years, the em-

<sup>\*</sup> Notwithstanding the unparticularized stress which the employer places on these trials (Emp. Br., pp. 13-14), it is clear that, since the trials occurred subsequent to the discharge of the employees, they have no relevance to the question of the employer's knowledge, at the time of the discharge, of the C. I. O.'s discriminatory purpose in requesting the discharge pursuant to the closed-shop agreement. The employer also stresses the "guilty" plea of some of the employees (Emp. Br., p. 14), but an examination of the trial transcript (R. III, 969-976) indicates that the employees did no more than admit that they engaged in the work stoppage, a fact which was never denied and which was true of most of the 313 employees. Their plea was in the nature of a demurrer to the complaint: they were not acting as penitents throwing themselves on the mercy of the tribunal.

ployees undertook to oust the C. I. O. as their bargaining representative at a period during which it was appropriate to seek a redetermination of representatives (R. I, 75, 54-55; R. III, 802, 799-805, R. II, 552). The Board further determined that "It is clear from the record, and we find, that the [employer] knew of the C. I. O.'s reason for demanding the discharges" (R. I, 76), namely, the employer "knew, when it discharged and refused to reinstate the complainants, that the C. I. O. demanded such action because of the complainants' exercise of the right guaranteed employees in the Act to bargain collectively through representatives 'of their own choosing'" (R. I, 76). The Board concluded that the employer "thereby violated Section 8 (1) and (3) of the Act, for the reasons stated in the *Rutland Court* case" (R. I, 76).

In *Matter of Rutland Court Owners, Inc.*, 44 N. L. R. B. 587, 46 N. L. R. B. 1040, the Board determined that the proviso to Section 8 (3) of the Act does not authorize an employer to discharge employees pursuant to the closed-shop provisions of a contract when, to his knowledge, the discharge is requested by the union which is a party to the contract, for the purpose of eliminating employees who have sought to change bargaining representatives at a period when it is appropriate for the employees to seek a redetermination of representatives. Giving its reasons at length, the Board stated that:

The proviso relating to the closed shop is not a severable and separate portion of the Act. It must be construed in the light of the statutory statement of policy and the general provisions of the Act, and if any seeming conflicts arise they should be resolved so as to give proper effect to the salient provisions of the Act. \* \* \*

The express purpose of the Act is to insure employees of their own right of self-organization and a free choice of representatives. We cannot allow the declared intention of Congress to be evaded by permitting an employer and a union \* \* \* to combine to preclude the employees from expressing their choice. The proviso to Section 9 (3) cannot therefore be considered as an instrument for depriving employees of their statutory right to select another representative for a period succeeding the term embraced by the closed-shop contract. We recognize the force of the arguments in favor of stability, but \* \* \* the stability intended by the Act is not that involved in perennial suppression of the employee's will [46 N. L. R. B., at 1042].

\* \* \* the mere fact that all closed shops are not unlawful, by virtue of the proviso, is no reason for holding that closed shops may be made perpetual because validly initiated pursuant to the proviso. Thus, for example, in the *Ansley Radio* case [18 N. L. R. B. 1028, 1061], the Board

confined its decision, that discharges made under a validly executed closed-shop contract did not constitute unfair labor practices, to cases where the agreement was "for a reasonable period of time" or "for a reasonable duration." In the instant case, a consideration of the facts will demonstrate that to sustain the contention of the [employer and the contracting union] would be to enforce a closed shop for an unreasonable period, indeed for an indefinitely long period or perhaps even in perpetuity [44 N. L. R. B., at 594-595].

\* \* \* \* \*

\* \* \* If these employees could lawfully be discharged, as the [employer and the contracting union] contend, because when their contract was about to expire such employees evinced a desire to have a different representative negotiate their next contract, then as each succeeding contract was about to expire the [employer and the contracting union] could renew the process of eliminating all employees who wished to change their representative for the forthcoming contract period. Thus, the [employer and the contracting union] are in substance contending that they may lawfully bar the employees in perpetuity from changing to a representative of their own free choice even if the [contracting union] is not the choice of a single employee affected at the threshold of each new contract period.

This could not have been the intent of Congress. \* \* \* Effectuation of the basic policies of the Act requires, as the life of the collective contract draws to a close, that the employees be able to advocate a change in their affiliation without fear of discharge by an employer for so doing [44 N. L. R. B., at 595-596].

\* \* \* To insist that employees can never transfer their affiliation from one union to another, or to prevent employees toward the close of one contract period from changing their representatives for the purpose of negotiating and administering a new contract for the succeeding term is to impair rather than protect self-organization, to thwart rather than encourage collective bargaining by representatives of the employees' genuine choice, and accordingly to produce contracts which will not tend to stabilize mutually satisfactory labor relations or safeguard industrial peace. The stability intended by the Act is not that involved in a perennial suppression of the employees' will [44 N. L. R. B., at 597].

### III

#### THE BOARD'S ORDER

The Board's order requires the employer to cease and desist from encouraging or discouraging membership in the A. F. of L., the C. I. O., or any other labor organization of its employees by discharging or refusing to reinstate any of

its employees, or by discriminating in any other manner in regard to their hire, tenure, or other terms of employment (R. I, 80). Affirmatively, the Board's order requires the employer to offer reinstatement with back pay to the thirty-seven employees, and to post an appropriate notice (R. I, 81-82).<sup>10</sup>

#### IV

##### THE PROCEEDINGS IN THE COURT BELOW

On December 30, 1946, the employer filed in the court below a petition to review and set aside the Board's order (R. I, 101-126). The Board in its answer requested enforcement of its order (R. I, 134-142). The C. I. O., A. F. L., and named individuals, whom the Board's order required the employer to reinstate with back pay, were permitted by order of the court below to intervene in the proceeding (R. I, 143-144). On January 13, 1949, the court handed down its opinion (R. IV, 990-992), and entered its decree enforcing the Board's order (R. IV, 993-996).

In pertinent part the decision below stated that (R. IV, 992):

The Board found as ultimate facts (a) that the CIO sought to use the closed-shop contract for the purpose of punishing the

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<sup>10</sup> That part of the Board's order (R. I, 83) which sets aside the election is not before the Court for review at the present time. *National Labor Relations Board v. Falk Corporation*, 308 U. S. 453. Contrary to intimations in the employer's brief (pp. 27, 32, 35, 46, 57, 61), the Board's order does not set aside the closed-shop agreement.

insurgents, and (b) that Colgate acceded to its discharge-demands notwithstanding Colgate knew that the union had suspended the men in reprisal for their activities in favor of the rival union. The evidence abundantly supports these findings. As a matter of law, the Board determined that the closed-shop contract did not preclude the employees from engaging in these activities at the time they did so. Its decision rests upon the reasoning followed in *Matter of Rutland Court Owners*, 44 N. L. R. B. 587; 46 N. L. R. B. 1040. This view had our approval in *Local No. 2880 v. National Labor Relations Board*, 158 F. 2d 365. The latter holding controls the present case.

In its earlier decision in the *Local 2880* case, the court below stated that (158 F. 2d, at 368, 369):

The Board's construction of the proviso of subsection 8 (3) with relation to section 7 conferring on \* \* \* all employees the right "to bargain collectively through representatives of their own choosing," as not warranting a discharge for activities at an election for such choice is so obviously rational that we well could be required to accept it under the rule that upon "questions of law, the experienced judgment of the Board is entitled to great weight." *Medo Corporation v. National Labor Relations Board* 321 U. S. 678, 681.

\* \* \* we are of the opinion that it is the only interpretation to be given the proviso \* \* \*

\* . \* \* \*

\* \* \* The Board's interpretation, in addition to confirming the democratic process in bargaining agency elections, prevents the use of the proviso for the perpetuation of a particular union's control of the employees once it enters into a closed shop contract with their employer.

#### SUMMARY OF ARGUMENT

The Board has construed and applied the proviso to Section 8 (3) of the National Labor Relations Act as not authorizing an employer to comply with the closed-shop provisions of a contract when, to his knowledge, discharges pursuant to the contract are sought by the contracting union as a penalty for rival union activity carried on during a period when it is lawful and appropriate for the employees to seek a redetermination of representatives. This view represents the most reasonable reconciliation between the general guarantees of the Act, which permit employees to choose and change representatives, and the limitations imposed by the proviso, which permit discipline of employees in the interest of union security and stability of the bargaining relationship.

This Court in *Wallace Corporation v. National Labor Relations Board*, 323 U. S. 248, 256, held that it did "not construe the provision authorizing a closed shop contract as indicating an intention on the part of Congress to authorize a majority of workers and a company, as in the instant case, to penalize minority groups of work-

ers by depriving them of that full freedom of association and self-organization which it was the prime purpose of the Act to protect for all workers." In the *Wallace* case the rival union activity of those in the minority group occurred prior to the execution of the closed-shop contract and resulted in the majority union thereafter denying them membership and securing their discharge under the closed-shop contract. In the instant case the rival union activity occurred four years after the execution of the closed-shop contract and resulted in the contracting union thereafter suspending those active in the rival union activity from membership in the contracting union and securing their discharge under the closed-shop contract. In both cases the employer at the time it made the requested discharges had knowledge that the requests therefor were based on rival union activities. We believe the principle of the *Wallace* case is as fully applicable in the one situation as in the other. Furthermore, the present statutory provisions of the Labor Management Relations Act, 1947, pertaining to union-security agreements, and the legislative history leading to them, show legislative approval of the *Wallace* case and the desirability of adherence to it.

The principle of the *Wallace* case is sound. The proviso to Section 8 (3) of the Act, which permits the making of a closed-shop agreement by a legitimate labor organization representing

the majority of employees in an appropriate unit, does not define the conditions under which it may be subsequently *performed*. This lack of definition of the legal incidents of a closed-shop agreement was deliberate, because the single purpose of the proviso was to prevent the total invalidation of closed-shop agreements, by virtue of the Act's ban on discrimination in employment practices because of union activity, without preventing accommodation of the closed-shop agreement to the public policy of the states. Since the performance of a closed-shop agreement is not in terms governed by the proviso, the effect to be given such an agreement when it touches on the exercise of the congressionally-protected right of choice of representatives must be drawn from the Act's basic guarantee of free choice. The fundamental postulate upon which the employees' right to self-organization and collective bargaining rests is the employees' freedom to choose and change bargaining representatives at regular intervals without constraint.

The Board's rejection of the absolute conception of a closed-shop agreement as permitting any discharge for any cause without question conforms to the traditional practice of states hospitable to the closed-shop agreement which, while permitting its making and performance generally, nevertheless do not allow it to be used arbitrarily for purposes insupportable by public policy. So too, preventing the interposition of the closed-

shop agreement to hamper free choice of representatives does not impair legitimate concern with secure and responsible trade unionism.

An employer's answerability for its wrongdoing in discriminating against employees by knowingly discharging them for rival union activity carried on at an appropriate period is not affected by the Board's lack of power to reach the contracting union's independent wrongdoing in requesting the discharges for such protected activity by employees. The employer's responsibility turns on its knowledge of the contracting union's discriminatory purpose. Such knowledge may be established by proving, as here, (1) actual knowledge of the contracting union's discriminatory purpose, or alternatively, (2) knowledge of facts which would apprise a reasonable man of the contracting union's discriminatory purpose, or further, but not involved in this case, (3) knowledge of facts sufficient to place a duty of inquiry upon the employer which if pursued would disclose the contracting union's discriminatory purpose.

Lastly, to prevent disruption of the exclusive representative's status during the early part or mid-term of its closed-shop agreement, the employees' rival union activity, to be protected, must occur at a time appropriate for redetermination of representatives. The period appropriate for advocacy of a rival union to displace the contracting union which has a closed-shop agreement

generally coincides with the period when the Board in a representation proceeding would consider a test of the majority status of any existing exclusive representative to be timely. In terms of the present case, the closed-shop agreement for an indefinite term between the C. I. O. and the employer, in existence for more than four years, no longer gave the C. I. O. immunity from challenge, because at that stage, under the Board's well-settled rules, the need of affording the employees an opportunity to oust or reaffirm their bargaining representative prevailed over the need for affording a period of quiet enjoyment to an agreement arrived at through collective bargaining.

### ARGUMENT

THE PROVISIO TO SECTION 8 (3) OF THE NATIONAL LABOR RELATIONS ACT DOES NOT GIVE AN EMPLOYER THE UNQUALIFIED RIGHT TO DISCHARGE EMPLOYEES AT THE DEMAND OF THE CONTRACTING UNION PURSUANT TO A CLOSED-SHOP AGREEMENT WHERE, TO THE EMPLOYER'S KNOWLEDGE, THE CONTRACTING UNION'S PURPOSE IS TO PUNISH EMPLOYEES FOR ENGAGING IN ACTIVITY ON BEHALF OF A RIVAL UNION, CARRIED ON DURING A PERIOD WHEN IT IS LAWFUL AND PROPER FOR THE EMPLOYEES TO SEEK A REDETERMINATION OF REPRESENTATIVES

#### *A. Preliminary statement*

The essential facts as found by the Board are: After a closed-shop agreement of indefinite duration had been in effect for more than four years, the employees engaged in advocacy of a rival union in order to replace the contracting union as the exclusive bargaining representative; to resist

the movement to oust it, the contracting union suspended thirty-seven employees from membership in the union, and requested their discharge, for the purpose of punishing them for engaging in rival union activity; and the employer, with knowledge of the contracting union's purpose, acceded to the request of the contracting union that the employees be discharged under the closed-shop agreement. On these findings, the Board held the discharges were effected in violation of Section 8 (1) and (3) of the National Labor Relations Act for which the proviso to Section 8 (3) afforded no exculpation. Section 8 (3) of the Act before the 1947 amendments<sup>11</sup> provided that:

It shall be an unfair labor practice for an employer—

\* \* \* \* \*

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act \* \* \* shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a con-

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<sup>11</sup> Inasmuch as Section 102 of the Labor Management Relations Act, 1947, precludes a retroactive application of its terms to make unlawful that which was, prior to its enactment, not an unfair labor practice, it is necessary to determine whether the conduct herein complained of was violative of the National Labor Relations Act prior to its amendment.

dition of employment membership therein, if such labor-organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

The Board's interpretation of the statute is that the proviso to Section 8 (3) of the Act does not immunize an employer where, to his knowledge, enforcement of the closed-shop contract is being sought by the contracting union as a penalty for activity on behalf of a rival union, if such rival union activity was carried on during a period when it was lawful and proper for the employees to seek a redetermination of representatives.<sup>12</sup> The statutory right of employees to choose bargaining representatives embraces the right to seek a change of representatives at appropriate regular intervals. If employees could advocate change in representation only at the risk of imperiling their employment status under a closed shop contract, their statutory right would amount to little.

The Board's interpretation represents its considered judgment as to how the conflict between

<sup>12</sup> Although this case embraces a conventional closed-shop agreement, the Board's view includes any form of union security agreement requiring membership in a labor organization as a condition of obtaining or retaining employment. For a judicial description of the varying forms which such agreements may take, see *Colonial Press, Inc. v. Ellis*, 321 Mass. 495, 499, 74 N. E. 2d 1, 3. See also, *Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.*, 335 U. S. 525, 528, n. 2; Despres, *The Collective Agreement for the Union Shop*, 7 U. of Chi. L. Rev. 24, 25-26 (1939).

the general but basic guarantees of the Act (Sections 1 and 7), which permit employees to choose and change representatives, and the limitations imposed by the proviso to Section 8 (3), which permit discipline of employees in the interest of union security and stability of the bargaining relationship, may most reasonably be reconciled so that the legitimate scope of each may be preserved without nullifying the other.

**B. *The Board's interpretation of the proviso to Section 8 (3) of the Act has been upheld in "Wallace Corporation v. National Labor Relations Board," 323 U. S. 248***

The Board's construction of the proviso to Section 8 (3) of the Act has been upheld by this Court in *Wallace Corporation v. National Labor Relations Board*, 323 U. S. 248, affirming 141 F. 2d 87 (C. A. 4), enforcing 50 N. L. R. B. 138, and by the Courts of Appeals for the Second, Third and Ninth Circuits<sup>13</sup> but rejected by the

<sup>13</sup> *National Labor Relations Board v. Geraldine Novelty Co.*, 713 F. 2d 14 (C. A. 2); *National Labor Relations Board v. American White Cross Laboratories, Inc.*, 160 F. 2d 75 (C. A. 2); *Colonie Fibre Company, Inc. v. National Labor Relations Board*, 163 F. 2d 65 (C. A. 2); *National Labor Relations Board v. Public Service Transport*, 24 L. R. R. M. 2466 (C. A. 3). The Board's construction has been approved by the court below in the present case and in its earlier decision in *Local No. 2880 v. National Labor Relations Board*, 158 F. 2d 365, certiorari granted, 331 U. S. 798, certiorari dismissed on motion of petitioner, 332 U. S. 845. The latter case is noted in 56 Yale L. J. 1048 (1947); 15 U. of Chi. L. Rev. 232 (1947); and 33 Va. L. Rev. 521 (1947).

Seventh Circuit.<sup>14</sup> The Board has consistently applied this construction in a long line of decisions.<sup>15</sup> The pertinency of the decision in the *Wallace* case requires its consideration at some length.

<sup>14</sup> *Lewis Meier & Co. v. National Labor Relations Board*, 21 L. R. R. M. 2093 (C. A. 7, November 3, 1947), "on the authority of *Aluminum Company of America v. National Labor Relations Board* (1946), 159 F. 2d 523 (C. A. 7)." See also, *Owens-Illinois Glass Company v. National Labor Relations Board*, 24 L. R. R. M. 2356 (C. C. A. 7). As to the position of the Courts of Appeals for the Sixth Circuit, *semble*, *National Labor Relations Board v. Eaton Mfg. Co.*, 175 F. 2d 292 (C. A. 6) (Query whether the court rejected the underlying findings of fact necessary to sustain the Board's view of the law as without adequate support in the evidence, or whether, assuming adequately supported findings of fact, it rejected the Board's conclusions on the law).

<sup>15</sup> *Matter of Rutland Court Owners, Inc.*, 44 N. L. R. B. 587, 46 N. L. R. B. 1040; *Matter of Wallace Corp.*, 50 N. L. R. B. 138, enforced, 141 F. 2d 87 (C. A. 4), affirmed, 323 U. S. 248; *Matter of Mead Corp.*, 52 N. L. R. B. 1361; *Matter of Portland Lumber Mills*, 64 N. L. R. B. 159, enforced, 158 F. 2d 365 (C. A. 9); *Matter of Diamond T Motor Car Co.*, 64 N. L. R. B. 1225; *Matter of Cliffs Dore Chemical Co.*, 64 N. L. R. B. 1419; *Matter of Southwestern Portland Cement Co.*, 65 N. L. R. B. 1; *Matter of American White Cross Laboratories, Inc.*, 66 N. L. R. B. 866, enforced, 160 F. 2d 75 (C. A. 2); *Matter of Colonie Fibre Co., Inc.*, 69 N. L. R. B. 589, enforced, 163 F. 2d 65 (C. A. 2); *Matter of Eureka Vacuum Cleaner Co.*, 69 N. L. R. B. 878; *Matter of Spicer Mfg. Corp.*, 70 N. L. R. B. 41; *Matter of Rheem Mfg. Co.*, 70 N. L. R. B. 57; *Matter of Colgate-Palmolive-Peet Co.*, 70 N. L. R. B. 1202; *Matter of Lewis Meier & Company*, 73 N. L. R. B. 520, enforcement denied, 21 L. R. R. M. 2093 (C. A. 7, November 3, 1947); *Matter of Durasteel Co.*, 73 N. L. R. B. 941; *Matter of E. L. Bruce Company*, 73 N. L. R. B. 992; *Matter of Pillsbury Mills, Inc.*, 74 N. L. R. B. 1113; *Matter of Geraldine Novelty Co., Inc.*, 74 N. L. R. B. 1503, enforced, 173 F. 2d

In order to resolve a disputed question of employee representation between a C. I. O. affiliate and an independent union concerning which of the two was authorized to act as the exclusive bargaining representative, the C. I. O., the Independent, and the employer entered into an agreement providing for the conduct of an election by the Board and binding the employer to execute

14 (C. A. 2); *Matter of E. L. Bruce Company*, 75 N. L. R. B. 522; *Matter of Basic Vegetable Products, Inc.*, 75 N. L. R. B. 815; *Matter of Gamble-Skogmo, Inc.*, 75 N. L. R. B. 1068; *Matter of Ellis Canning Co.*, 76 N. L. R. B. 99; *Matter of Eaton Mfg. Co.*, 76 N. L. R. B. 261, enforcement denied, 175 F. 2d 292 (C. A. 6); *Matter of Fajardo Development Co.*, 76 N. L. R. B. 956; *Matter of Public Service Corp.*, 77 N. L. R. B. 153, enforced, 24 L. R. R. M. 2466 (C. A. 3); *Matter of Detroit Gasket and Mfg. Co.*, 78 N. L. R. B. 670; *Matter of Stainslaus Food Products Co.*, 79 N. L. R. B. 260; *Matter of Selig Mfg. Co., Inc.*, 79 N. L. R. B. 114; *Matter of National Electric Products Corp.*, 80 N. L. R. B., No. 151, 23 L. R. R. M. 1148; *Matter of Owens-Illinois Glass Co.*, 80 N. L. R. B., No. 141, 23 L. R. R. M. 1191, enforcement denied, 24 L. R. R. M. 2356 (C. A. 7); *Matter of Westinghouse Electric Corp.*, 80 N. L. R. B., No. 143, 23 L. R. R. M. 1181; *Matter of Revere Copper and Brass Co., Inc.*, 80 N. L. R. B., No. 220, 23 L. R. R. M. 1244; *Matter of Hamilton-Scheu & Walsh Co.*, 80 N. L. R. B., No. 234, 23 L. R. R. M. 1263; *Matter of General Instrument Corp.*, 82 N. L. R. B., No. 100, 23 L. R. R. M. 1633; *Matter of American Packing Corp.*, 82 N. L. R. B., No. 117, 23 L. R. R. M. 1640; *Matter of Interstate Engineering Corp.*, 83 N. L. R. B., No. 16, 24 L. R. R. M. 1031; *Matter of Horn Mfg. Co., Inc.*, 83 N. L. R. B., No. 168, 24 L. R. R. M. 1206; *Matter of United Engineering Co.*, 84 N. L. R. B., No. 10, 24 L. R. R. M. 1213. See also, *Matter of Monsieur Henri Wines, Ltd.*, 44 N. L. R. B. 1310; *Matter of Utica & Mohawk Cotton Mills, Inc.*, 51 N. L. R. B. 257, 259, n. 5; *Matter of Larus & Brother Company*, 62 N. L. R. B. 1075.

a closed-shop agreement with the successful union. The Independent won the ensuing election and it was certified by the Board as the exclusive representative. The Independent thereupon notified the employer that it wished to hasten execution of the closed-shop agreement in order to permit elimination of the C. I. O. adherents among the employees by excluding them from membership in the Independent, thereby forcing their discharge. Knowing the Independent's purpose, the employer entered into the closed-shop agreement and thereafter acceded to the Independent's request to discharge forty-three employees, all of whom had been members of the C. I. O. and thirty-one of whom had applied for membership in Independent and had been rejected. Finding that the employer "was put on notice that [Independent's] real purpose was to bar from future employment with the [employer] persons who had adhered to the [C. I. O.] in the election campaign" (50 N. L. R. B., at 154), the Board found the discharges to be unlawful, holding that "An employer may not enter into a closed-shop contract which to his knowledge is designed to operate as an instrument for effecting discrimination against his employees solely because of their prior union activities" (50 N. L. R. B., at 153). Affirming the Board's view, this Court stated (323 U. S., at 255-256):

The duties of a bargaining agent selected under the terms of the Act extend beyond

the mere representation of the interests of its own group members. By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially. Otherwise, employees who are not members of a selected union at the time it is chosen by the majority would be left without adequate representation. No employee can be deprived of his employment because of his prior affiliation with any particular union. The Labor Relations Act was designed to wipe out such discrimination in industrial relations. Numerous decisions of this Court dealing with the Act have established beyond doubt that workers shall not be discriminatorily discharged because of their affiliation with a union. We do not construe the provision authorizing a closed shop contract as indicating an intention on the part of Congress to authorize a majority of workers and a company, as in the instant case, to penalize minority groups of workers by depriving them of that full freedom of association and self-organization which it was the prime purpose of the Act to protect for all workers. It was as much a deprivation of the rights of these minority employees for the company discriminatorily to discharge them in collaboration with Independent as it would have been had the company done it alone.

The force of this Court's conclusion is emphasized by the contention which it rejected (323 U. S., at 255):

But the proviso in Section 8 (3) permits union shop agreements. It follows therefore, the company argues, that, inasmuch as such agreements contemplate discharge of those who are not members of the contracting union, and inasmuch as the company has no control over admission to union membership, the contract is valid and the company must discharge non-union members, regardless of the union's discriminatory purpose, and the company's knowledge of such purpose. This argument we cannot accept.

The instant case is, we believe, governed by the *Wallace* case. Here, as in that case, a minority of the employees in the appropriate unit were discharged because of their union activities. Here, as in that case, the employer in making the discharges was acting in compliance with the literal terms of a closed-shop contract theretofore executed with the union chosen by a majority of the employees in the unit. Here, as in that case, the Board held that the closed-shop contract did not justify the discharges because the employer knew at the time it made the discharges that the majority union invoked the agreement to eliminate those employees who advocated a rival union. In both cases the rival union activities revolved around a Board conducted election. In

the *Wallace* case the discharges occurred after the election. In this case nine of the discharges occurred during the four days before a petition for an election was filed, and the other twenty-eight discharges occurred during the ensuing two months when the proceedings before the Board preliminary to holding the election were taking place. The nine employees discharged prior to the filing of the election petition applied for and were denied reinstatement after the employer knew of the pendency of the Board proceedings for an election.

The only important factual difference between the *Wallace* situation and the present case is that in *Wallace* the closed-shop agreement was entered into by the employer with knowledge of its discriminatory purpose whereas here the agreement was proper at its inception but was thereafter utilized to the employer's knowledge for a discriminatory purpose. This factual difference is without legal significance. "In the one case the making of the contract, in the other case the performance of it, is against public policy."<sup>16</sup> In both cases the essence of illegality resides in the use of a closed-shop agreement as a device to discriminate against employees for advocacy of a rival union at a time appropriate

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<sup>16</sup> *Ominia Co. v. United States*, 261 U. S. 502, 512, quoting with approval from *In re Shipton, Anderson & Co.*, [1915] 3 K. B. 676, 683-684. See also, Restatement, Contracts, Sec. 608; 6 Williston, Contracts (Rev. Ed.), Sec. 1759.

for choice.<sup>17</sup> In both cases the object was "to penalize minority groups of workers by depriving them of that full freedom of association and self-organization which it was the prime purpose of the Act to protect for all workers" (323 U. S., at 256).<sup>18</sup> Indeed, even this factual distinction may not be available, for in *Wallace* the closed-shop contract was entered into pursuant to the tri-

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<sup>17</sup> The employer's attempt to distinguish between *Wallace* and this case on the ground that in *Wallace* the contracting union unreasonably denied membership" to the employees whereas here the employees had been admitted to membership but were thereafter suspended is without merit (Br., p. 65). There is no difference in principle between the refusal to *admit* an employee to membership in a union for a proscribed reason and the *suspension or expulsion* of an employee from membership in a union because of a proscribed reason. A closed-shop agreement contemplates that an employee *obtain and retain* union membership and there is no less reason to protect an employee from the consequences of his loss of membership than from his inability to acquire membership. Just as "discrimination in hiring is twin to discrimination in firing" (*Phelps Dodge Corporation v. National Labor Relations Board*, 313 U. S. 177, 187-188), so here, discrimination in obtaining union membership is twin to discrimination in retaining union membership. Indeed, in this very case, both types of discrimination were involved (*supra*, p. 26 and n. 8).

<sup>18</sup> The interlocking nature of the two cases is shown by the administrative evolution of the Board's interpretation of the proviso. The Board's rule had its beginning with *Matter of Rutland Court Owners, Inc.*, 44 N. L. R. B. 587, in which enforcement of a closed-shop agreement valid at its inception was declared unlawful because of the discriminatory use to which it was put. Thereafter, the Board decided *Matter of Monsieur Henri Wines, Ltd.*, 44 N. L. R. B. 1310, in which a closed-shop agreement was held invalid at its inception

partite agreement which was at its inception without taint.<sup>18a</sup>

The *Wallace* case is not distinguishable on the grounds that Independent was a company-dominated labor organization. The tri-partite agreement entered into between the C. I. O., Independent, and the employer, providing for an election by consent and the execution of a closed-shop agreement with the victorious union, was in settlement of charges of company domination filed by the C. I. O. against the Independent. In conformity with the Board's policy of not going behind settlement agreements to take cognizance of unfair labor practices antedating the settlement in the absence of a subsequent unfair labor practice, the Board did not consider the domination

because entered into with the purpose of depriving employees of their jobs who had by their union activity offended the employer. Subsequently, on rehearing of the *Rutland Court* case, the Board abided by its earlier decision, 46 N. L. R. B. 1040. These two cases coalesced in *Matter of Wallace Corporation*, 50 N. L. R. B. 138, affirmed by this Court, in which *Matter of Rutland Court Owners, Inc.*, holding the performance of a closed-shop agreement valid at its inception to be unlawful and *Matter of Monsieur Henri Wines, Ltd.*, holding the execution of a closed-shop agreement to be invalid at the outset, were both cited in support of the Board's interpretation, 50 N. L. R. B., at 153. When the *Wallace* case was reviewed by the Court of Appeals for the Fourth Circuit, both the *Rutland Court* and *Henri Wines* cases were cited by the Court in approving the Board's interpretation, 141 F. 2d, at 90. Thus, from the very outset, the making of the agreement as distinguished from its performance has not been regarded as a critical distinction.

<sup>18a</sup> See, Comment, 56 Yale L. J. 1048, 1051 (1947).

issue until it first ascertained whether the discharges under the closed-shop agreement, the only subsequent unfair labor practice involved (50 N. L. R. B., at 154), were in themselves unlawful. As explained by Professor Dodd, "Because of the Board's rule that charges of unfair labor practices antedating a settlement are revived if, but only if, there has been some subsequent unfair labor practice—a rule which is approved by the opinion of the Court—the crucial question in the case was whether the discharge of the excluded employees was an unfair labor practice within the meaning of the Act. That question could not be answered by characterizing Independent as company-dominated, since the only evidence justifying such characterization was evidence of pre-settlement facts which by hypothesis were not to be inquired into unless a post-settlement unfair labor practice had first been established."<sup>10</sup> Thus, as the Board explained, it was only after the Board "found that unfair labor practices were committed by the [employer] after as well as before the settlement agreements" that the Board went into "consideration of the events preceding the settlement agreements" (50 N. L. R. B., at 154, 152). In conformity with the rule that "the grounds upon which an administrative order must be judged are those upon which the record dis-

<sup>10</sup> Dodd, *Discrimination by Labor Unions in the Exercise of Statutory Bargaining Powers*, 58 Harv. L. Rev. 448, 452 (1945).

closes that its action was based,"<sup>20</sup> this Court was constrained to determine, as it did, that "the Board correctly found that there was a subsequent unfair labor practice" (323 U. S., at 255).<sup>21</sup> The dominated-character of Independent was therefore irrelevant to the determination of the legal incidents of the closed-shop agreement, and in dissent, Mr. Justice Jackson expressly alluded to the fact that the same result would follow had the C. I. O. been the contracting union (323 U. S., at 271-272). Nor can the *Wallace* case be explained away as an instance of collusion or conspiracy between the employer and Independent, for as the Court expressly noted, "Neither the Board nor the court below found that the company engaged in a conspiracy to bring about the discharge of former C. I. O. members" (323 U. S., at 252-253).

The clarity of this analysis is somewhat obscured by this Court's statement, in adverting to the employer's dismissal of its employees under the closed-shop agreement, "To permit it to do so by indirection, through the medium of a 'union' of its own creation, would be to sanction a readily

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<sup>20</sup> *Securities and Exchange Commission v. Chenery Corporation*, 318 U. S. 80, 87; 332 U. S. 194, 196.

<sup>21</sup> In like fashion, the Court of Appeals for the Fourth Circuit, in reviewing the Board's order, also determined that "The Board, we think, was justified in finding that this was an unfair labor practice and upon such finding was justified in considering in connection therewith the unfair labor practices which had occurred prior to the agreement." (141 F. 2d, at 91. )

contrived mechanism for evasion of the Act" (323 U. S., at 256). However, we do not think this means that the *Wallace* case depended on the factor of company-domination. If company-domination were the decisive factor, the closed-shop agreement would be invalid by the very terms of the proviso itself which preclude "making an agreement with a labor organization \* \* \* established, maintained, or assisted by any action defined in this Act as an unfair labor practice \* \* \*," and any discussion beyond this short answer would have been unnecessary. That the *Wallace* case is not regarded by the Court as resting on so narrow a ground is indicated by the subsequent cases in which it is cited. *Wallace* and other cases, it was stated in *Hunt v. Crumboch*, 325 U. S. 821, 826, "stand for the principle that a bargaining agent owes a duty not to discriminate unfairly against any of the group it purports to represent." Citing *Wallace*, this Court in *Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.*, 335 U. S. 525, 532, 531, analyzed state laws prohibiting the closed-shop agreement in terms of the protection of "employment opportunities of members of *independent unions*," (emphasis supplied); and Mr. Justice Frankfurter, concurring in *American Federation of Labor v. American Sash & Door Company*, 335 U. S. 538, 546, cited *Wallace* as illustrating the effect given to "a legislative purpose to protect individual employees against the exclusionary

practices of unions." See also, *Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U. S. 711, 733, n. 30; *Trailmobile Co. v. Whirls*, 331 U. S. 40, 49, n. 16, 44, n. 8. The court below<sup>22</sup> and the Second Circuit,<sup>23</sup> in approving the Board's interpretation of the proviso, and the Seventh Circuit,<sup>24</sup> even after rejecting it, have not read the *Wallace* principle as applicable only to a company-dominated labor organization.<sup>25</sup>

C. *The Labor Management Relations Act, 1947, shows legislative endorsement of the "Wallace" and "Rutland Court" principles*

While the instant case arises under and is controlled by the National Labor Relations Act prior to its amendment, we believe it is relevant that the Labor Management Relations Act, 1947, by its provisions and by its legislative history shows Congressional endorsement of the *Wallace* and *Rutland Court* principles. Indeed, Section 8 (a) (3) (C) of the final version of the Senate bill specifically provided that: "\* \* \* no employer shall justify any discrimination against an employee for nonmembership in a labor organiza-

<sup>22</sup> *Local 2880 v. National Labor Relations Board*, 158 F. 2d 365, 368-369.

<sup>23</sup> *National Labor Relations Board v. American White Cross Laboratories*, 160 F. 2d 75, 77; *National Labor Relations Board v. Geraldine Novelty Co., Inc.*, 173 F. 2d 14, 17.

<sup>24</sup> *Owens-Illinois Glass Company v. National Labor Relations Board*, 24 L. R. R. M. 2356.

<sup>25</sup> But see, *National Labor Relations Board v. Eaton Mfg. Co.*, 175 F. 2d 292 (C. A. 6).

tion \* \* \* (C) if he has reasonable grounds for believing that membership was denied or terminated because of activity designed to secure a determination pursuant to section 9 (c) (1) (A), at a time when a question concerning representation may appropriately be raised" (H. R. 3020, 80th Cong., 1st Sess., reprinted in *Legislative History of the Labor Management Relations Act, 1947* (Gov't. Print. Office, 1948), p. 238.) During the hearings preceding its enactment, the *Wallace and Rutland Court* cases were mentioned with entire approval. The only criticism was that there were additional situations of wrongful discharges under closed-shop agreements for which employers should be liable and that the union which brought about the discharges should also be responsible therefor.<sup>26</sup> Section 8 (a) (3) (A) and (B) as finally adopted authorized an employer to discharge employees under a union security agreement only (1) for failure to acquire membership open to employees upon nondiscriminatory terms and (2) for nonpayment of union dues and initiation fees. This made it unnecessary to retain the Senate bill's specific codification of the Board's interpretation of the proviso to Section 8 (3) of the Act.<sup>27</sup>

<sup>26</sup> S. Rep. No. 105, 80th Cong., 1st Sess., pp. 21-22; 93 Cong. Rec. 1825.

<sup>27</sup> Although it is irrelevant to the instant case, to complete the legislative picture, it is to be noted that Section 8 (b) (2) of the amended Act provides that it is an unfair labor practice for labor organizations "to cause or attempt to cause an

D. *Neither the language of the proviso to Section 8 (3) of the original National Labor Relations Act nor its legislative history authorizes the use of a closed-shop agreement for the purpose of eliminating efforts to secure a change in bargaining representatives*

Even if *Wallace* were not controlling, examination anew of the interpretation to be accorded the proviso to Section 8 (3) of the original National Labor Relations Act affirms the soundness of the Board's construction. That construction, reading the proviso "not by taking the word or clause in question from its setting and viewing it apart, but by considering it in connection with the context, the general purposes of the statute in which it is found, the occasion and circumstances of its use, and other appropriate tests for the ascertainment of the legislative will,"<sup>22</sup> is consonant with the Congressional purpose.

employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership," and Section 10 (c) provides that "where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him." See, *National Labor Relations Board v. Geraldine Novelty Co.*, 173 F. 2d 14, 18 (C. A. 2); *Matter of Newman*, 85 N. L. R. B., No. 132, 24 L. R. R. M. 1463, 1466-1467.

<sup>22</sup> *Helvering v. Stockholms Enskilda Bank*, 293 U. S. 84, 93-94.

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The employer here assumes that the proviso to Section 8 (3) legitimatizes not only the making of closed-shop agreements but all discharges made pursuant to their terms, irrespective of the circumstances or the consequences attending the discharges. However, even read literally, the proviso merely legitimatizes the making of the agreement under the National Labor Relations Act and in no way defines the area of its operation in the limitless combination of circumstances to which it is potentially applicable. It reads:

That nothing in this Act \* \* \* shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

It is plain that the *making* of the agreement is hedged with the requirements that the labor organization be free of employer assistance or control and that it represent a majority of the employees in an appropriate unit. In the absence of compliance with these safeguards, the closed-shop agreement is invalid at its inception. In this way the agreement at the outset is oriented with the main body of the Act by endowing only an unencumbered labor organization freely chosen

by a majority of the employees with capacity to enter into such an agreement.<sup>29</sup> It is hardly possible that the *making* of the closed-shop agreement should be so carefully integrated into the scheme of the Act, but that its *performance* thereafter should be utterly uninhibited by any concern for preserving the opportunity for freedom of choice which is the Act's basic postulate.

The absence of specific definition in the proviso of the circumstances under which a closed-shop agreement might properly be performed is consistent with its limited purpose. The object of Congress in inserting the proviso to Section 8 (3) was only to prevent the general prohibition upon employer discrimination in hire or tenure of employment for union activity from being construed as an absolute ban of the closed-shop. It was designed to avoid the misconception, which had arisen under Section 7 (a) of the National Industrial Recovery Act,<sup>30</sup> that the right guaranteed to employees to organize and bargain collectively without constraint required without more total invalidation of closed-shop agreements.<sup>31</sup> But this single purpose aside, the proviso neither enhanced nor diminished the legal attributes

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<sup>29</sup> *National Labor Relations Board v. Electric Vacuum Cleaner Company*, 315 U. S. 685, 693-695.

<sup>30</sup> 48 Stat. 195, 198-199.

<sup>31</sup> See, Comment, *Effect of Section 7 (a) of NIRA on the Validity of a Closed Union-Shop Contract*, 44 Yale L. J. 1067 (1935).

which a closed-shop agreement would otherwise possess. It left the evolution of the closed-shop agreement and the moulding of its legal incidents to determination by state or other federal law. *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 336 U. S. 301. The Senate Report on the bill which became the Act states (S. Rep. No. 573, 74th Cong., 1st Sess., 11-12):

\* \* \* The reason for the insertion of the proviso is as follows: According to some interpretations, the provision of section 7 (a) of the National Industrial Recovery Act, assuring the freedom of employees "to organize and bargain collectively through representatives of their own choosing," was deemed to illegalize the closed shop. \* \* \*

\* \* \* to prevent similar misconceptions of this bill, the proviso in question states that nothing in this bill, or in any other law of the United States, or in any code or agreement approved or prescribed thereunder, shall be held to prevent the making of closed-shop agreements between employers and employees. In other words, the bill does nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal; it does not interfere with the *status quo* on this debatable subject but leaves the way open to such agreements as might now be legally consummated \* \* \*

The House Report is equally emphatic (H. Rep. No. 1147, 74th Cong., 1st Sess., 19-20):

The proviso to the third unfair labor practice, \* \* \* does not give new legal sanctions to the closed shop. All that it does is to eliminate the doubts and misconstructions in regard to the effect of section 7 (a) upon closed-shop agreements, and the possible repetition of such doubts and misconstructions under this bill, \* \* \*. The bill does nothing to legalize the closed-shop agreement in the States where it may be illegal; but the committee is confident that it would not be the desire of Congress to enact a general ban upon closed-shop agreements in the States where they are legal. \* \* \*

In his major speech to the Senate in support of the bill, Senator Wagner stated (79 Cong. Rec. 7570):

\* \* \* The much-discussed closed-shop proviso merely states that nothing in any Federal law shall be held to illegalize the confirmation of voluntary closed-shop agreements between employers and workers. This interpretation is necessary to prevent repetition of those mistaken interpretations which have held that Congress intended to outlaw the closed shop when it enacted section 7 (a) of the Recovery Act.

I hold no brief for or against the closed shop, but there are some who believe that it is a device which at times may be neces-

sary to advance and preserve the living standards of employees. It is legal in many States, and there is no reason why Congress should make it illegal in those places where public policy now sustains it.

The same explanation of the proviso was made on the floor of the House (79 Cong. Rec. 9717).

Thus, the proviso to Section 8 (3) of the Act at most "merely disclaims a national policy hostile to the closed shop or other forms of union-security agreement." *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 336 U. S. 301, 307. It does not proclaim a policy exalting the closed-shop agreement to a level antagonistic to the foundation of the Act itself.<sup>22</sup>

<sup>22</sup> The *Algoma* case, the employer contends (Br., p. 48), holds that a closed-shop agreement valid under local law is valid under the National Labor Relations Act, and that under California law the closed-shop agreement in this case was permitted. The *Algoma* case holds that a closed-shop agreement permitted by the federal act may be prohibited by local law; it does not hold that a closed-shop agreement forbidden by the federal act may be permitted by the local law. Plainly local law inconsistent with the federally protected right of choice of representatives must yield to the federal law. *Hill v. Florida*, 325 U. S. 538; *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U. S. 767; *La Crosse Telephone Corp. v. Wisconsin Employment Relations Board*, 336 U. S. 18; see also, *National Labor Relations Board v. Hearst Publications*, 322 U. S. 111, 123; *Hamilton v. National Labor Relations Board*, 160 F. 2d 465, 571 (C. A. 6), certiorari denied *sub. nom. Kalamazoo Stationery Co. v. National Labor Relations Board*, 160 F. 2d 465, 571 (C. A. 6), certiorari ~~agreement in the instant circumstances (*infra*, pp. 13-14, 15, p. 48).~~

*E. The general purpose and structure of the Act require that the proviso be construed so as to permit employees freedom periodically to change bargaining representatives*

Since the performance of a closed-shop contract is not in terms governed by the proviso, the effect to be given such an agreement when it touches on the exercise of the congressionally protected right of choice of representatives must be drawn from the general purpose and structure of the Act.

Section 7 of the Act guarantees that:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

The rights so granted are implemented by proscribing certain unfair practices: infringement by employers of the rights guaranteed by Section 7; employer domination of labor organizations; employer alteration of employment terms to encourage or discourage employee activity on behalf of a labor organization; employer discrimination against an employee because he has filed charges or given testimony under the Act; and employer refusal to bargain collectively with the representative chosen by a majority of the employees in an appropriate unit (Section 8 of

the Act). Of these banned practices, "a discriminatory discharge of an employee because of his union affiliations goes to the very heart of the Act."<sup>33</sup>

This pattern of protection is essential in maintaining the integrity of employee freedom of choice upon which collective bargaining rests. When a majority of the employees within an appropriate unit have freely designated a representative, it becomes the employer's duty "to bargain collectively with the chosen representative of his employees. The obligation being exclusive, \* \* \* it exacts 'the negative duty to treat with no other'."<sup>34</sup> The existence of a statutory representative of the employees not only precludes the employer from bargaining with any other labor organization, but during the effective period of the representative's authority, it prevents negotiation "with individual employees, whether a majority or a minority, with respect to wages, hours and working conditions. \* \* \*"<sup>35</sup> By this means, as Mr. Justice Frankfurter observed in his concurring opinion in *American*

<sup>33</sup> *National Labor Relations Board v. Entwistle Mfg. Co.*, 120 F. 2d 532, 536 (C. A. 4).

<sup>34</sup> *Medo Photo Supply Corp. v. National Labor Relations Board*, 321 U. S. 678, 683-684.

<sup>35</sup> *Ibid.* See also, *May Department Stores Co. v. National Labor Relations Board*, 326 U. S. 376, 384-385; *National Labor Relations Board v. Crompton-Highland Mills, Inc.*, 337 U. S. 217; *J. I. Case Company v. National Labor Relations Board*, 321 U. S. 332.

*Federation of Labor v. American Sash & Door Company*, 335 U. S. 538, 552-553, the Act insures:

against that undercutting of union standards which was one of the most serious effects of a dissident minority in a union shop. Under interpretations of the National Labor Relations Act undisturbed by the Taft-Hartley Act, and of the Railway Labor Act, the bargaining representative designated by a majority of employees has exclusive power to deal with the employer on matters of wages and working conditions. Individual contracts, whether on more or less favorable terms than those obtained by the union, are barred. \* \* \*

Under these laws, a non-union bidder for a job in a union shop cannot, if he would, undercut the union standards.

While majority rule is the only practical means of translating individual freedom of choice into unified action and thereby giving it realistic effect,\* majority rule does not imply indifference to minority interests. The essence of fair and workable majority rule is the responsibility of the representative to all elements of its constituency. Alert to the need for protecting the minority from possible abuse by the majority, Congress through the reports of its committees made clear that any benefits attained by the exclusive representative during its incumbency

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\* S. Rep. No. 573, 74th Cong., 1st Sess., 13; H. Rep. No. 1147, 74th Cong., 1st Sess., 20, 21.

through collective bargaining are to be given on "equally advantageous terms to nonmembers of the labor organization negotiating the agreement." "Since the agreement made will apply to all, the minority group and individual workers are given all the advantages of united action. \* \* \* agreements more favorable to the majority than to the minority are impossible."<sup>37</sup> Furthermore, the Senate Committee noted the incapacity of the exclusive representative to act in a manner inconsistent with "genuine collective bargaining" (S. Rep. No. 573, 74th Cong., 1st Sess., 13-14):

Another protection for minorities is that the right of a majority group through its representatives to bargain for all is confined by the bill to cases where the majority is actually organized "for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." An organization which is not constructed to practice genuine collective bargaining cannot be the representative of all employees under this bill.

In terms equally applicable to an exclusive representative under the National Labor Relations Act, in speaking of an exclusive representative which derived its status from the Railway Labor

<sup>37</sup> H. Rep. No. 1147, 74th Cong., 1st Sess., 20-21; see also, S. Rep. No. 573, 74th Cong., 1st Sess., 13. See, *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, 202, n. 3.

Act,<sup>38</sup> this Court defined the duty of fair dealing which a representative owes to each of the divergent elements which make up its constituency: (*Steele v. Louisville & Nashville Railroad Co.*, 323 U. S. 192, 198-204):

\* \* \* the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights.

\* \* \* The labor organization chosen to be the representative of the craft or class of employees is \* \* \* chosen to represent all of its members, regardless of their union affiliation or want of them.

\* \* \* While the majority of the craft chooses the bargaining representative, when chosen it represents, as the Act by its terms makes plain, the craft or class, and not the majority. The fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents. \* \* \*

<sup>38</sup> 44 Stat. 577, 45 U. S. C. 151, *et seq.*

While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith.

In accordance with its duty of fair representation, a labor organization entrusted with exclusive authority to bargain for all employees does not thereby become empowered by the Act to perpetuate itself by entering into contractual arrangements designed to insulate itself from opposition. Democratic procedure requires that a representative periodically submit itself to its constituency for approval or rejection. A representative empowered to preclude, forestall, or frustrate an untrammelled contest of its rights to continue as representative by disenfranchising those members of its constituency who oppose it cuts to the heart of freedom of choice on which majority rule rests for its sanction.

The Act was passed in contemplation of rival unionism, for contrary to the employer's contention (Emp. Br., pp. 19, 56-57), the division in the American labor movement between the American Federation of Labor and the Congress of Industrial Organizations which occurred after the adoption of the Act did not introduce, but only accentuated, the problems arising from labor or-

ganizations in competition. Rival unionism has been a concomitant of trade union activity since the inception of workers' organizations,<sup>39</sup> and with the advent of governmental processes for the determination of bargaining representatives, observers very early noted the need for tempering an absolute conception of the closed-shop agreement with effectuation of the statutory policy of securing an untrammelled employee resolution of inter-union disputes.<sup>40</sup> This Court in *American Federation of Labor v. National Labor Relations Board*, 308 U. S. 401, 411, n. 4, rejected the view that inter-union disputes were not contemplated when the Act was passed: "*Congress apparently recognized that representation proceedings under § 9 (c) might involve rival unions.* The House Committee said: 'Section 9 (c) makes provision for elections to be conducted by the Board or its agents or agencies to ascertain the representatives of employees. *The question will ordinarily arise*

<sup>39</sup> See the illustrative authorities collected in Note, *The Influence of the National Labor Relations Board Upon Inter-Union Conflicts*, 38 Col. L. Rev. 1243 (1938). See also, *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011; *National Protective Association v. Cumming*, 170 N. Y. 315, 63 N. E. 369.

<sup>40</sup> Witmer, *Collective Labor Agreements in the Courts*, 48 Yale L. J. 195, 221 (1938); Despres, *The Collective Agreement For the Union Shop*, 7 U. of Chi. L. Rev. 24, 44-50, 32-33, 43-44 (1939); Comment, *Effect of Section 7 (a) of NIRA on the Validity of A Closed Union-Shop Contract*, 44 Yale L. J. 1067, 1072 (1935). See also, Willcox, *The Tri-boro Case—Mountain or Molehill?*, 56 Harv. L. Rev. 576, 585-587, 592-596 (1943).

*as between two or more bona fide organizations competing to represent the employees, but the authority granted here is broad enough to take in the not infrequent case where only one such organized group is pressing for recognition, and its claim of representation is challenged.*' H. Rep. No. 1147, Committee on Labor, 74th Cong., 1st Sess., p. 22." [Emphasis supplied.] "As was stated by Senator Walsh on the floor of the Senate in explaining the attributes of majority rule and the effect of a choice of a majority representative (79 Cong. Rec. 7673):

That does not mean that the minority cannot protest by their vote. That does not mean that the minority cannot criticize. That does not mean that the minority cannot see fit to make a change at the next election.

To construe the proviso as sanctioning the conversion of a closed-shop agreement into an instrument for suppressing the employees' democratic aspirations for orderly change is to stultify the

"See also the explanation of Senator Walsh on the floor of the Senate (79 Cong. Rec. 7659-7660): "When a dispute arises between an employer and a group or groups of employees as to which organization is the legal one, the company union, the A. B. C. union, the fellowship union, or the trade union, the board takes jurisdiction, and thus is determined who and what kind of a labor organization represents the employees. The board will arrange for an election and provide for secret ballot. It will then find out what organization represents the majority of the employees and who are to be the representatives."

opportunity for choice which would otherwise exist among contesting unions simply because one of them possesses a closed-shop agreement.

The opportunity to choose and periodically to change representatives without constraint is the essential scheme which the Act envisages as indispensable to industrial democracy. It provides the frame of reference for determining the effect to be given the closed-shop agreement in this case. The agreement here provided that "The Union is hereby recognized as the sole collective bargaining representative for all employees covered by this agreement" (R. III, 787). The closed-shop provision of the agreement is the product of negotiation on union security which, subject to governmental regulation of its terms, is a mandatory subject of collective bargaining between employers and exclusive representatives because embraced within the area of "conditions of employment" (Section 9 (a) of the Act).<sup>4</sup> The agreement was here used to suppress the very freedom of choice guaranteed employees under the Act by causing the discharge of employees who sought at an appropriate time and by orderly means to displace the incumbent by another union

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<sup>4</sup> *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, 360; *National Labor Relations Board v. Andrew Jergens Company*, 175 F. 2d 130 (C. A. 9), certiorari denied, October 10, 1948, No. 225, this Term; *National Labor Relations Board v. Winona Textile Mills, Inc.*, 160 F. 2d 201, 208-209 (C. A. 8); *National Labor Relations Board v. Reed & Prince Mfg. Co.*, 118 F. 2d 874, 883 (C. A. 1), certiorari denied, 313 U. S. 595.

more to their liking. A closed-shop agreement put to such a use reduces an employee's freedom of choice to a freedom to advocate a change at the risk of losing his job. It enables the incumbent representative to retain its status, not by the continuing voluntary support of an unfettered majority, but by compelling conformity to it through its power to control the retention of jobs. It forces employees who desire a change to campaign, if at all, only in secret and fear, and, as the facts in this case demonstrate (*supra*, pp. 10-14),<sup>43</sup> to resist depletion of their leadership and support only by recourse "to strike, with the attendant interruption of commerce, which the Act seeks to avoid."<sup>44</sup> It impedes industrial peace, because a collective bargaining agreement negotiated and administered by a union which retains its support by stifling its opposition "probably would not command the assent of the majority and hence would not have the stability which is one of the chief advantages of collective bargaining."<sup>45</sup>

The Act is not so self-defeating that it countenances the conversion of a closed-shop contract

<sup>43</sup> See also, for strikes resulting from discharges for rival union advocacy, *Matter of National Electric Products Corp.*, 80 N. L. R. B., No. 151, 23 L. R. R. M. 1148; *Matter of Horn Mfg. Co., Inc.*, 83 N. L. R. B., No. 168, 24 L. R. R. M. 1206, 1207.

<sup>44</sup> *Steele v. Louisville & Nashville Railroad Co.*, 323 U. S. 192, 200.

<sup>45</sup> H. Rep. No. 1147, 74th Cong., 1st Sess., 20.

into an instrument antithetical to the Act's basic guarantee of freedom of choice. Indeed, to construe the Act as authorizing the discharge of employees for advocacy of a change at an appropriate time raises the question whether there is an unconstitutional invasion of the rights of the persons so discharged, an interpretation which settled canons of construction require be avoided. For if there is a constitutional duty to exercise a power of representation derived from the government without arbitrary discrimination as between persons represented, it may be argued that a majority union may not lawfully exercise congressionally granted powers so as to combine the closed shop with invidious denial of good standing to employees who oppose it, with resultant loss of employment to them, in order to perpetuate a status which rests on congressional grant."

*F. States hospitable to the closed-shop agreement do not permit its blanket performance under all circumstances; it is unlikely, therefore, that such absolutism was contemplated by Congress*

Because the evolution of the legal incidents of a closed-shop agreement has been largely left to determination by state law (see pp. 58-61,

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\* *Steele v. Louisville & Nashville Railroad Co.*, 323 U. S. 192, 198-199, and concurring opinion of Mr. Justice Murphy at 208-209; *Betts v. Easley*, 161 Kan. 459, 169 P. 2d 831; Dodd, *Discrimination by Labor Unions in the Exercise of Statutory Bargaining Powers*, 58 Harv. L. Rev. 448, 453-454 (1945).

*supra*), it is relevant to inquire as an aid to interpretation whether jurisdictions ordinarily hospitable to the closed-shop agreement have accorded to it the absolute sanctity which the employer imputes to it. If states hospitable to the closed-shop agreement do not permit its enforcement where performance is deemed detrimental to the commonweal, it would be unlikely that Congress should have intended such an absolutism to inhere in the closed-shop agreement for purposes of the Federal Act.

In California the closed-shop agreement has received generous judicial treatment. *Park & Tilford Import Corporation v. International Brotherhood, Local No. 848*, 27 Cal. 2d 599, 165 P. 2d 891. Nevertheless, the California courts hold that a closed-shop agreement may not be utilized to cause the termination of a worker's employment for non-membership in a labor union where membership in the union is not open to him upon reasonable terms. *James v. Marinship Corp.*, 25 Cal. 2d 721, 155 P. 2d 329; *Bautista v. Jones*, 25 Cal. 2d 746, 155 P. 2d 343; *Dotson v. International Alliance*, 246 R. R. M. 2601 (Cal. Sup. Ct., September 30, 1949); *Thompson v. Moore Drydock Co.*, 27 Cal. 2d 595, 165 P. 2d 901; *Williams v. International Brotherhood of Boilermakers*, 27 Cal. 2d 586, 165 P. 2d 903. As explained in the *Williams* case (27 Cal. 2d, at 591, 165 P. 2d, at 906): "The individual worker denied the right to keep his job suf-

fers a loss, and his right to protection against arbitrary and discriminatory exclusion from union membership should be recognized whenever membership is a necessary prerequisite to work."

In 1937, New York adopted a State Labor Relations Act,<sup>4</sup> following the federal pattern, which by the proviso to Section 704 (5) thereof, in substantially the same terms as the proviso to Section 8 (3) of the national Act, provided "that nothing in this article shall preclude an employer from making an agreement with a labor organization requiring as a condition of employment membership therein, if such labor organization is the [designated majority] representative of employees. \* \* \*". Eschewing reliance upon this proviso as the basis for decision, the New York Court of Appeals in *Williams v. Quill* affirmed the propriety of the closed-shop agreement, at the same time stating certain limitations upon its enforceability (277 N. Y. 1, 7, 12 N. E. 2d 547, 549):

\* \* \* a labor organization is permitted to combine and to strike in a particular industry for the purpose of obtaining employment for its own people, even to the extent of excluding others from the entire industry who are not union men. *The one reservation in this law is that the attempt to accomplish the end shall be carried out in good faith and for the declared purposes, and not through malice or ill-will or a*

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<sup>4</sup> Laws of New York, 1937, Chap. 443, 30 McKinney's Consolidated Laws of New York, Labor Law, §§ 700-716.

*desire to injure non-union employees or simply and solely for the purpose of keeping them out of work. [Emphasis supplied.]*

In a subsequent case the New York Court of Appeals held that a closed-shop agreement could not validly be used to limit employment to sons of members. In an action by workers to prevent their loss of employment the court directed the union either to admit the non-filial workers to membership or to cease giving effect to the closed-shop agreement by which it was sought to exclude them from employment. *Clark v. Curtis*, 297 N. Y. 1014, 80 N. E. 2d 536, affirming 273 App. Div. 797, 76 N. Y. S. 2d 3, reversing 71 N. Y. S. 2d 55. The New York State Labor Relations Board, the agency entrusted with the administration of the New York Labor Relations Act, when confronted with the same abuse of the closed-shop agreement that is presented in this case, ruled that (*Matter of Club Transportation Corp.*, 10 N. Y. S. L. R. B. 485, 509): “

The expiration date of the \* \* \* contract was June 30, 1945. As of May 3d, therefore, it had only some eight weeks to

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<sup>48</sup> See, New York State Labor Relations Board, Eleventh Annual Report, 1948, pp. 70-72. Illustrating the cross-pollinating nature of state and federal adjudication, the New York Board in this case and the California Supreme Court in the *Williams* case, *supra*, p. 73 (27 Cal. 2d, at 592, 165 Pac. 2d, at 906) both found support for their conclusions in the National Board's decision in *Matter of Rutland Court Owners, Inc.*, 44 N. L. R. B. 587, and related cases, the soundness of which are now in issue.

run. Deducting the thirty days grace period allowed by that contract, less than a month remained before its expiration. *It is well settled that a contract requiring membership in a union may not be used to stifle a desire for change of bargaining representatives, and therefore may not be used as justification for discharge as the expiration date of the contract approaches.* [Emphasis supplied.]

The decision of the New York Board was affirmed in *New York Labor Relations Board v. Club Transportation Corp.*, 24 L. R. R. M. 2274 (N. Y., App. Div., June, 1949).

In comparable fashion, Pennsylvania,<sup>49</sup> New Jersey,<sup>50</sup> Maryland,<sup>51</sup> Ohio,<sup>52</sup> and Oregon<sup>53</sup> have also granted relief against loss of gainful employment where refusal of membership in the labor organization results from reasons deemed contrary to state policy. Thus, the public policy of states denies effect to a closed-shop agreement where exclusion from membership is grounded on

<sup>49</sup> *Dorrington v. Manning*, 135 Pa. Super. 194, 4 A. 2d 886; *Schwartz v. Laundry & Linen Supply Drivers' Union*, 339 Pa. 353, 14 A. 2d 438.

<sup>50</sup> *Wilson v. Newspaper & Mail Deliveries' Union*, 123 N. J. Eq. 347, 197 A. 720; *Carroll v. Local No. 269*, 133 N. J. Eq. 144, 31 A. 2d 223.

<sup>51</sup> *Lucke v. Clothing Cutters and Trimmers' Assembly*, 77 Md. 396, 26 A. 505.

<sup>52</sup> *Wills v. Local 106, Hotel & Rest. Employees*, 28 Ohio N. P. (N. S.) 435.

<sup>53</sup> *Schwab v. Moving Pict. Mach. Operators*, 165 Ore. 602, 109 P. 2d 600.

race discrimination;<sup>54</sup> on nepotism;<sup>55</sup> on appropriate rival union activity;<sup>56</sup> on refusal to permit self-employed persons to ply their trade coupled with denial of union membership to them;<sup>57</sup> on closing of membership books because present members are unemployed;<sup>58</sup> on confinement of employment opportunities in the industry to present members without affording an opportunity for membership to others who desire and are qualified to join;<sup>59</sup> and on no disclosed reason at all.<sup>60</sup>

Ascertainable state law rejects the notion, therefore, that the closed-shop agreement may be used

<sup>54</sup> *James v. Marinship Corp.*, 25 Cal. 2d 721, 155 P. 2d 329; *Williams v. International Brotherhood of Boilermakers*, 27 Cal. 2d 586, 165 P. 2d 903; *Thompson v. Moore Drydock Co.*, 27 Cal. 2d 595, 165 P. 2d 901; *Wills v. Local 106, Hotel & Rest. Employees*, 26 Ohio N. P. (N. S.) 435. See also, *Betts v. Easley*, 161 Kan. 459, 169 P. 2d 831.

<sup>55</sup> *Clark v. Curtis*, 297 N. Y. 1014, 80 N. E. 2d 536, affirming 273 App. Div. 797, 76 N. Y. S. 2d 3, reversing 71 N. Y. S. 2d 55.

<sup>56</sup> *Matter of Club Transportation Corp.*, 10 N. Y. S. L. R. B. 485, 509, affirmed, *New York Labor Relations Board v. Club Transportation Corp.*, 24 L. R. R. M. 2274 (N. Y., App. Div., June, 1949).

<sup>57</sup> *Bautista v. Jones*, 25 Cal. 2d 746, 155 P. 2d 343; see also, *Schwartz v. Laundry & Linen Supply Drivers' Union*, 339 Pa. 353, 361-362, 14 A. 2d 438, 442.

<sup>58</sup> *Wilson v. Newspaper & Mail Deliverers' Union*, 123 N. J. Eq. 347, 197 A. 720; *Lucke v. Clothing Cutters & Trimmers Assembly*, 77 Md. 396, 26 A. 505.

<sup>59</sup> *Schwab v. Moving Pict. Mach. Operators*, 165 Ore. 602, 109 P. 2d 600. See also, *Carroll v. Local No. 269*, 133 N. J. Eq. 144, 31 A. 2d 223; *Shinsky v. O'Neil*, 232 Mass. 99, 104, 121 N. E. 790, 792.

<sup>60</sup> *Dorrington v. Manning*, 135 Pa. Super. 194, 4 A. 2d 886.

to control employment without regard to the arbitrary nature of its enforcement in the particular circumstances to which it is applied. Since the enforceability of a closed-shop agreement is generally subject to adjustment in conformity with public policy, it would be inconsonant to infer that Congress by the proviso to Section 8 (3) of the Act meant to accord to the closed-shop agreement absolute sanction disabling its accommodation to the basic purposes of the Act. Lack of absolutism in the enforcement of closed-shop agreements for state purposes implies a comparable area of flexibility for federal purposes.

*G. The Board's interpretation of the proviso to Section 8 (3) preserves the integrity of the Act without impairing the essence of the closed-shop agreement*

Evaluated in terms of the social advantages attributed to the closed-shop agreement, the Board's interpretation of the proviso to Section 8 (3) of the Act preserves the integrity of the Act without impairing the essence of the closed-shop agreement. The major reasons advanced by responsible union leaders for seeking a closed-shop may be characterized as (1) security and share the cost, (2) responsibility, and (3) sentimental or social. In terms of security, by requiring all employees to be union members, it prevents attrition of the union's adherents, thereby maintaining and enhancing its bargaining power.

through the strength which comes from unity; in terms of share the cost, it requires all those who obtain the benefits of union standards to share the financial burdens incurred in their acquisition and maintenance; in terms of responsibility, by subjecting all the employees to common union discipline, it enables the union to enjoin adherence to its rules and to the obligations of the collective bargaining agreement, thereby preventing their irresponsible infringement with resultant disadvantage to both management and labor; and, in terms of the sentimental or social reason, union men usually prefer to work with those sympathetic to their views and resent the presence of nonunion men who are potentially dangerous to their cause.<sup>61</sup>

1. *Security and share the cost*: The Board's interpretation of the proviso preserves to a union for the term of its contract, so long as it continues to be the exclusive representative, the security which inures to the union through maintenance of unanimous membership among the employees in the unit for which it bargains. Employees who advocate a change to a rival union

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<sup>61</sup> This generalized statement is derived from: *The Closed Shop and Union Security*, Economic Brief of the American Federation of Labor, submitted in *Lincoln Federal Labor Union v. Northwestern Iron and Metal Company*, 335 U. S. 525, and from the materials collected in Appendix B, pp. 86-116, of the Board's brief in *Wallace Corporation v. National Labor Relations Board*, Nos. 66, 67, October Term, 1944.

are nonetheless required to remain members in the contracting union for the life of the current contract.<sup>62</sup> They are likewise required to continue to pay their membership dues and other financial obligations to the contracting union.<sup>63</sup> And if the contracting union, after an unfettered contest, retains its status as the exclusive bargaining representative, any ensuing compulsory membership agreement it negotiates may properly require rival union adherents to obtain membership in the contracting union as a condition of employment so long as exclusion from the union is not premised on the antecedent rival union activity.<sup>64</sup> Furthermore, as fully explained hereafter (*infra*, pp. 102-110), the Board confines the protected time during which rival union advocacy may be undertaken to a reasonable period before the expiration of the closed-shop agreement, thus justifying a request for the discharge of employees who seek to displace the contracting union during the early life or mid-term of the contract.<sup>65</sup>

<sup>62</sup> *Matter of Rutland Court Owners, Inc.*, 46 N. L. R. B. 1040, 1041-1042; *Matter of Mead Corporation*, 52 N. L. R. B. 1361, 1361-1362 and n. 1, 1368 and n. 7; *Matter of Utica & Mohawk Cotton Mills, Inc.*, 51 N. L. R. B. 257, 259 and n. 5. This very case shows that membership must be maintained at all times. An employee was held properly discharged, notwithstanding her advocacy of the A. F. L., because she had refused to obtain membership in the C. I. O. (R. I, 74, 21, R. II, 647-653).

<sup>63</sup> *Ibid.*

<sup>64</sup> *Matter of Ellis Canning Company*, 76 N. L. R. B. 99, 113-114.

<sup>65</sup> It may be noted that the Act itself, even in the absence of a closed-shop agreement affords a significant measure of

2. *Responsibility*: Rival union adherents are not only required to maintain their membership in the contracting union during the life of the closed-shop agreement, they are by the same token also required to conform to the union's valid rules of conduct and to respect the standards imposed by the collective bargaining agreement. For example, the contracting union may require each member to "conform to, and abide by the rules concerning wages and hours, and working rules, as agreed upon by the Local;" it may require "each member to attend one meeting a month, vote in all elections and read the official publication of the local;" it may forbid any member from leaving "the meeting while in session, except by permission;" it may exclude from the meeting any "member under the influence of liquor;" it may insist that no "member shall maliciously, and without cause, bring charges against another

union security to a majority representative. Protection of the union standards from undermining is secured under the Act by investing exclusive status to deal with the employer in the majority representative and preventing employer encroachment on the right to organize and bargain collectively (*supra*, pp. 62-64). The Act itself therefore provides the protection against inroads on the union's security which until its passage was one of the main functions of the closed-shop agreement, and the enhanced protection which a closed-shop agreement still affords is not under the Act's standards indispensable to the union's capacity to function effectively. If it were, the Act would not have subjected the acquisition of a closed-shop agreement both to the exigencies of negotiation with the employer and to independent state regulation of its legal incidents (*supra*, pp. 57-61).

member;" and in like fashion, it may require adherence to the host of other proper rules deemed necessary to the promotion of the union's interests.<sup>66</sup> The contracting union may validly enjoin compliance with such rules by disciplinary action, and to that end invoke the closed-shop agreement to obtain the removal from employment of those members who have lost their good standing. The power of the union to maintain the employees' responsibility is accordingly in no way diminished.

It is necessary, however, carefully to distinguish between the failure of employees to *conform* to valid rules of conduct required by the contracting union and the action taken by employees to displace the contracting union. The taking of action by employees to displace the contracting union may not, under the guise of failure to conform to the contracting union's rules, be made the subject of disciplinary measures.<sup>67</sup> "A labor organization

<sup>66</sup> The illustrations are taken from the constitution and by-laws of the contracting union involved in this case received in evidence as Intervenor's Exhibit No. 5. They may be found *seriatim* at p. 18, Art. IX, Sec. 2; p. 19, Art. IX, Sec. 6; p. 29, Sec. 2; p. 30, Secs. 5 and 8.

<sup>67</sup> The Board will not inquire into the reasons which impel employees to leave one union and join another. " \* \* \* the function of this Board under Section 9 (c) of the Act is to ascertain the desires of employees with respect to their collective bargaining representative, not to pass judgment upon the reasonableness or wisdom of such desires. The Board has never inquired into the motives of employees who secede from one union and join another. Their reasons may be foolish or unjust, but such factors are not within the con-

cannot, by means of its membership rules, restrict the freedom of employees to designate a new collective bargaining representative \* \* \* " *Matter of E. L. Bruce Company*, 75 N. L. R. B. 522, 525.

3. *Sentimental or Social*: The desire of employees not to work with nonunion men as a sentimental or social matter is perhaps the least substantial social advantage attributed to the closed-shop agreement, and it could not justify creation of an enforceable right of adherents of one *bona fide* union to exclude the adherents of another *bona fide* union from gainful employment. The group in control has no higher ethical claim to its preferences than the group out of control, and if the in-group could insist upon its preferences to the exclusion of others, the out-group when it attains control could with equal propriety insist upon its exclusiveness, resulting in an endless cycle of recrimination. Moreover, to assume that a labor organization as a voluntary associa-

templation of a statute which makes the sole test of a bona fide bargaining agent's status depend upon whether or not a majority of the employees wish it to represent them." *Matter of Trailer Company*, 51 N. L. R. B. 1106, 1110-1111. Where, however, the labor organization designated by a majority of employees is incapable by virtue of its structure or policy of according impartial representation to any employee or group because of race, creed, color, or national origin, the Board will decline to certify it, or will rescind its earlier certification, as the exclusive representative. *Matter of Larus & Brother Company*, 62 N. L. R. B. 1075; *Matter of Atlanta Oak Flooring Company*, 62 N. L. R. B. 973; *Matter of Carter Mfg. Co.*, 59 N. L. R. B. 804; *Matter of Bethlehem-Alameda Shipyard, Inc.*, 53 N. L. R. B. 999, 1016.

tion may deny membership on the basis of unqualified preference is to ignore the fact that in contemporary life "a union occupies a quasi public position similar to that of a public service business and it has certain corresponding obligations. It may no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal associations. Its asserted right to choose its own members does not merely relate to social relations; it affects the fundamental right to work for a living." *James v. Marinship Corp.*, 25 Cal. 2d 721, 731, 155 P. 2d 329, 335."

In sum, the Board's interpretation of the proviso to Section 8 (3) of the Act, in preserving

"See also, *Washington Local Lodge No. 104 v. International Brotherhood of Boilermakers*, 203 Pac. 2d 1019, 1045, 23 L. R. R. M. 2578, 2597 (Wash. Sup. Ct., February 21, 1949): " \* \* \* the International Brotherhood has for some years had closed shop agreements \* \* \* [by which] the employers agreed to employ members of the Brotherhood exclusively, and all such employees were required to be hired through the office of the local union. In short, a boilermaker had to join the union in order to work at his trade and support himself and his family. There was no other way for him to secure or retain a job. Did he join the union voluntarily, in the same sense that a man voluntarily joined a theosophical society, church, charitable organization, or an organization to promote temperance or a mutual insurance society? We think not. He was compelled to join in order to make a living."

As stated in *Carroll v. Local No. 269*, 133 N. J. Eq. 144, 148, 31 A. 2d 223, 225: "If the characterization of a labor union as a voluntary association becomes in time a mere anachronism, the mere word 'voluntary' will not likely preserve the present state of the law." See also Summers, *The Right to Join a Union*, 47 Col. L. Rev. 33 (1947).

the integrity of the Act from impairment, does not detract from "the traditional method of a closed-shop agreement."<sup>69</sup>

H. *The Board's lack of power to reach the contracting union's discriminatory conduct in requesting the discharge does not detract from its power to reach the employer's independent wrongdoing in knowingly complying with the discriminatory request*

To escape responsibility for its knowing accession to the contracting union's discriminatory purpose, the employer argues that the Act does not prevent "coercion of employees by employees or labor organizations," which in essence is said to be the consequence of enforcement of the closed-shop agreement in the present case (Emp. Br., pp. 35, 36, 48-56). The fact that the Board, prior to the amendments to the Act made in 1947, was unable affirmatively to reach the independent wrongdoing of a labor organization through the avenue of an unfair labor practice proceeding does not prove that a labor organization was incapable of wrongdoing within the contemplation of the Act. The *Wallace* case itself undercuts this assumption, for it, together with *Steele v. Louisville & Nashville Railroad Co.*, 323 U. S. 192, place upon a labor organization acting as exclusive representative the duty of fairly representing all component groups of employees

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<sup>69</sup> S. Rep. No. 573, 74th Cong., 1st Sess., 13.

within the unit without hostile discrimination among them, an obligation flowing from the Act inconsistent with the conception that a labor organization may with all propriety "coerce" employees." Presaging the Second Circuit's later approval of the Board's interpretation of the proviso, the fallacy underlying the argument was lucidly exposed by Judge Learned Hand in *National Labor Relations Board v. Dadourian Export Corporation*, 138 F. 2d 891, 892, 893 (C. A. 2):

\* \* \* It is quite true that only an employer can be guilty of "unfair labor practices," (§ 8), but § 7 confers the right on all employees freely to choose their bargaining representatives, and the invasion of that right is as much a wrong when committed by a union organizer as by an employer. The fact that when it is not committed by an employer, the Board has no power to use its peculiar remedies to effectuate the policies of the act, must not blind us to the fact, that those policies include employees' freedom from interference with their choice of representatives from any source whatever.

\* \* \* the overriding consideration must always be the employees' untram-

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<sup>70</sup> See also, *Hughes Tool Co. v. National Labor Relations Board*, 147 F. 2d 69, 74 (C. A. 5); *Gauweiler v. Elastic Stop Nut Corp.*, 162 F. 2d 448, 451 (C. A. 3).

melled freedom of choice; upon that the whole framework rests.

In the words of Chief Justice Stone," "The right conferred on employees to bargain collectively through a representative of their own choosing is the foundation of the National Labor Relations Act. Without that right \* \* \* the Act as drawn would have little scope for operation. The fact that the National Labor Relations Act imposes sanctions on the employer alone does not mean that it did not, by § 7, confer the right on employees as against others as well as the employer to make an uninhibited choice of their bargaining agents. \* \* \* Section 7 confers the right of choice generally on employees and not merely as against the employer."

Of course, union conduct designed to restrict free employee choice is a wrong. But the controlling factor here is the employer's answerability for its own misconduct in discriminating against employees. That responsibility is not minimized or extinguished because of lack of power to reach the contracting union's independent wrongdoing." "The Labor Relations Act con-

<sup>11</sup> Concurring in *Hill v. Florida*, 325 U. S. 538, 545.

<sup>12</sup> Compare the situation in which an employer engages in an unfair labor practice when it fails affirmatively to take reasonable steps to prevent one group of employees, whether union or nonunion, from being ejected from the plant and ousted from their jobs by violence or other disorderly pres-

templates submission of disputes as to labor practices of employers to reasoned and impartial determination after full and fair hearing. If by that procedure there is found wrong-doing on both sides, the Board can act to prevent the employer wrong-doing prohibited by the Act, even though it can not reach other wrong-doing." *National Labor Relations Board v. Indiana & Michigan Electric Company*, 318 U. S. 9, 29.

The ancillary argument which the employer makes to escape responsibility rests on the following syllogism: the same policy of employee freedom of choice underlies both the Norris-LaGuardia Act<sup>78</sup> and the National Labor Relations Act, and the C. I. O.'s conduct in this case is antagonistic to the policy of both; the Norris-LaGuardia Act creates no right in the employees to be free of the C. I. O.'s coercion enforceable in a private suit for injunctive relief; hence, the National Labor Relations Act, which is based on

sure at the hands of another group of employees, whether union or nonunion. *National Labor Relations Board v. Hudson Motor Car Co.*, 128 F. 2d 528, 532-533 (C. A. 6); *National Labor Relations Board v. General Motors Corp.*, 116 F. 2d 306, 309-310, 311 (C. A. 7); *National Labor Relations Board v. Weissman*, 170 F. 2d 952 (C. A. 6), certiorari denied, 336 U. S. 972; *Clover Fork Coal Co. v. National Labor Relations Board*, 97 F. 2d 331 (C. A. 6); *Matter of Detroit Gasket & Mfg. Co.*, 78 N. L. R. B. 670, 671-672. In none of these cases does the Board have power to reach the wrong of the aggressor group of employees.

<sup>78</sup> 47 Stat. 70, 29 U. S. C. 101.

the same policy as the Norris-LaGuardia Act, creates no right in the employees to be free of the C. I. O.'s coercion, and from the employer's coercion based on the C. I. O.'s acts, enforceable in an unfair labor practice proceeding before the Board (Br., pp. 39-45).

Even if a federal district court were without jurisdiction to restrain the C. I. O.'s conduct because of the Norris-LaGuardia Act, a matter which may be open to question," that lack of power is without pertinence in determining the Board's competence to reach the employer. The reason which would disable the federal courts from granting relief, namely, the withdrawal of the federal courts from intervention in labor disputes, has no significance in demarking the Board's power to act. For, although both the

"The right of the employees to be free of the C. I. O.'s coercion would not be inferred from the Norris-LaGuardia Act, as was the situation in *Lauf v. E. G. Shinner & Co.*, 303 U. S. 323, but from the National Labor Relations Act. Since for the enforcement of this right, which would be drawn from the National Labor Relations Act, there is no available administrative remedy directly against the union before the Board the usual judicial remedies of injunction and money awards would be appropriate to the enforcement of the right (*Steele v. Louisville & Nashville R. R. Co.*, 323 U. S. 192, 204-208; *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323, U. S. 210; see also, *Virginian Railway Co. v. System Federation No. 40*, 300 U. S. 515, 563), unless Congress intended to make the right unjusticiable (cf. *U. E. R. and M. W. v. I. B. E. W.*, 115 F. 2d 488, 490-492 (C. A. 2)).

Norris-LaGuardia Act and the National Labor Relations Act serve the same statutory policy, the means adopted to that end are opposed; under the former the keynote is judicial abnegation, under the latter it is affirmative governmental action.

Congress carried over into Section 2 (9) of the National Labor Relations Act, both before and after its amendment, the same definition of a labor dispute which is embodied in the Norris-LaGuardia Act; and Section 2 (3) of the National Labor Relations Act defined the term "employee" to "include any employee" without limitation "to the employees of a particular employer" and to "include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice. \* \* \*" Unlike the Norris-LaGuardia Act, however, the objective of these familiarly broad definitions under the National Labor Relations Act<sup>75</sup> was not to exclude, but to guarantee unfettered governmental action within the orbit delineated by the National Labor Relations Act. Unlike the Norris-LaGuardia Act, which left the resolution of "economic conflict" to the play of "economic forces and the pressure of public opinion",<sup>76</sup> under the National

<sup>75</sup> *Jeffery-DeWitt Insulator Co. v. National Labor Relations Board*, 91 F. 2d 134 (C. A. 4), certiorari denied, 302 U. S. 731.

<sup>76</sup> *United States v. Hutcheson*, 312 U. S. 219, 231.

Labor Relations Act, Congress was by its own rule circumscribing the area of industrial combat by interdicting conduct described as unfair labor practices.

Therefore, while the concept of a labor dispute is equally as broad under the National Labor Relations Act as under the Norris-LaGuardia Act, its latitude under the former is designed to assure affirmative governmental action while under the latter it is designed to restrict it.<sup>77</sup> This distinction in purpose was recognized under the Railway Labor Act, the enforcement of which is based on direct equity suits by private parties,<sup>78</sup> to which the Norris-LaGuardia Act was held inapplicable because the Railway Labor Act "cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act."<sup>79</sup> Even

<sup>77</sup> See *Matter of American News Co., Inc.*, 55 N. L. R. B. 1302, 1313.

<sup>78</sup> As to the distinction between the enforcement machinery of the Railway Labor Act and the National Labor Relations Act, compare *Texas & N. O. R. Co. v. Brotherhood of Ry. and S. Clerks*, 281 U. S. 548, and *Virginian Railway Co. v. System Federation No. 40*, 300 U. S. 515, with *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261; *Fur Workers Union, Local No. 72 v. Fur Workers Union, No. 21238*, 105 F. 2d 1, 8-17 (C. A. D. C.); and *U. E. R. & M. W. v. I. B. E. W.*, 115 F. 2d 488 (C. A. 2). See also, *Switchmen's Union v. National Mediation Board*, 320 U. S. 297, and *General Committee v. M.-K.-T. R. Co.*, 320 U. S. 323.

<sup>79</sup> *Virginian Railway Co. v. System Federation No. 40*, 300 U. S. 515, 563.

more compellingly, in order to preserve the integrity of the governmental machinery devised to protect them, the enforcement of the rights secured under the National Labor Relations Act, centralized in the Board to the exclusion of any other tribunal, bars private recourse independently of the Board for injunctive relief against the wrongs denounced as unfair labor practices.<sup>80</sup> Thus, with respect to the matters committed to the Board's determination, the federal courts are without jurisdiction, not merely because the controversy involves a "labor dispute" within the meaning of the Norris-LaGuardia Act, but because it pertains to a subject entrusted to the Board's administration.

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<sup>80</sup> Cases before the amendment of the National Labor Relations Act: *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261; *U. E. R. & M. W. v. I. B. E. W.*, 115 F. 2d 488 (C. A. 2); *Fur Worker's Union, Local No. 72 v. Fur Workers's Union, No. 21238*, 105 F. 2d 1, 8-17 (C. A. D. C.) affirmed, 308 U. S. 522; *International Brotherhood v. International Union*, 106 F. 2d 871 (C. A. 9); *United Brick & Clay Workers of America v. Junction City Clay Company*, 158 F. 2d 552 (C. A. 6); *Blankenship v. Kurfman*, 96 F. 2d 450 (C. A. 7).

Cases after the amendment of the National Labor Relations Act: *Amazon Cotton Mills Co. and National Labor Relations Board v. Textile Workers Union*, 167 F. 2d 183 (C. A. 4); *Amalgamated Association v. Dixie Motor Coach Corp.*, 170 F. 2d 902 (C. A. 8); *I. L. U. v. Sunset Line & Twine Co.*, 77 F. Supp. 119 (N. D. Cal.); *Gerry v. Superior Court*, 194 Pac. 2d 689, 22 L. R. R. M. 2279 (Cal. Sup. Ct., June 16, 1948); *In re De Silva*, 199 P. 2d 6, 23 L. R. R. M. 2085 (Cal. Sup. Ct., November 16, 1948).

*I. In order to hold the employer responsible for a wrongful discharge under a closed-shop agreement, the employer must be shown to have knowledge of the contracting union's discriminatory purpose; and in order for the employees' rival union activity to be protected, it must occur during a period appropriate for the redetermination of representatives.*

It is clear that the proviso to Section 8 (3) of the Act does not afford an employer blanket justification for discharges of employees made at the behest of a contracting union pursuant to a valid closed-shop agreement. In preserving to employees an opportunity to engage in rival union activity the Board has, however, been careful to establish limitations on the protection available to employees and the duty laid upon employers. In the first place, the employer must be shown to have knowledge that the contracting union deprived the employees of good standing and demanded their discharge for activity on behalf of a rival union. And in the second place, the rival union activity, to be protected, must occur during a period when it is appropriate for the employees to seek a redetermination of representatives. The implication of each of these requisites may appropriately be explored in relation to the present case.

Absence of employer knowledge of the contracting union's discriminatory purpose frees the

employer of responsibility for acceding to the discriminatory request.<sup>81</sup> In this case, the Board found that the employer “*knew* of the C. I. O.’s reasons for demanding the discharges,” namely, “that the C. I. O. demanded such action because of the complainant’s exercise of the right guaranteed employees in the Act to bargain collectively through representatives ‘of their own choosing’ ” (R. I, 76).<sup>82</sup> The court below, stating that “the Board found as ultimate facts (a) that the CIO sought to use the closed-shop contract for the purpose of punishing the insurgents, and (b)

<sup>81</sup> It is significant, we believe, that the discharges in this case occurred in July, August, and September 1945, long after this Court had decided the *Wallace* case on December 18, 1944; and, as previously indicated, *supra*, p. 21, the employer’s labor relations director “fell back on legal advice” before making the discharges.

<sup>82</sup> Requisite knowledge has been deemed lacking as an appropriate basis for employer liability in *Matter of Diamond T. Motor Co.*, 64 N. L. R. B. 1225; *Matter of Spicer Mfg. Corp.*, 70 N. L. R. B. 41; *Matter of Basic Vegetable Products, Inc.*, 75 N. L. R. B. 815, 817, 828-831; *Matter of Stanislaus Food Products Co.*, 79 N. L. R. B. 260.

The employer states that the Board’s rule is anomalous because the protection of the employees turns on the employer’s knowledge of the discrimination, yet whether or not the employer knows of the discrimination, the employees have been wronged (Br., pp. 29-30). Plainly the only conscientious basis upon which the employer’s responsibility can rest is the employer’s knowing accession to the discriminatory act. Because some employees may be wronged without redress where the employer lacks knowledge, it does not follow that all of the employees should be wronged without redress even where the employer does know. The anomaly is in the employer’s position, not the Board’s.

that Colgate acceded to its discharge-demands notwithstanding Colgate knew that the union has suspended the men in reprisal for their activities in favor of the rival union," concluded that "the evidence abundantly supports these findings" (R. IV, 992). Actual knowledge of the contracting union's discriminatory purpose is therefore the basis of the employer's responsibility in the present case.

Upon the basis of evidence adduced at the hearing, the Board found, despite the employer's denial, that it knew of the C. I. O.'s discriminatory purpose. In so finding, the Board acts in the same capacity as does a jury when the jury returns a special verdict that the holder of a negotiable instrument knew, at the time he received the instrument, despite his denial, that there was an infirmity in it.<sup>83</sup> "Notice is a fact, the existence of which is to be established by evidence in the same manner as the existence of any other fact is established; and actual notice embraces all degrees and grades of evidence, from the most direct and positive proof to the slightest circumstances from which a jury would be warranted in inferring notice."<sup>84</sup> The denial of actual knowledge, like the denial

<sup>83</sup> See 4 Williston, Contracts, § 1157 (Rev. Ed. 1936).

<sup>84</sup> *In re Leterman, Becher & Co., Inc.*, 260 Fed. 543, 547 (C. A. 2), certiorari denied, *sub nom. Coleman & Co. v. Tawcas Co.*, 250 U. S. 668. Substantial evidence is that quantum of proof which is "enough to justify, if the trial were to a jury, a refusal to direct a verdict when the con-

of any operative fact, simply renders its proof difficult "because in the teeth of a denial the proof of motive must depend upon acts and circumstances which can never be conclusive and when motive is attributed to an artificial person it involves probing the intent of all the officers concerned."<sup>85</sup> Where, as here, knowledge is a prerequisite for charging a person with liability for conduct, the Board's refusal to credit the denial of knowledge, because of circumstances which make the truth of the disclaimer improbable, represents an unimpeachable exercise of a traditional function of any trier of fact in making "inquiries into the subjective." *Commissioner of Internal Revenue v. Culbertson*, 337 U. S. 733, 743.

In addition to actual knowledge, as an alternative ground for decision, in answer to the employer's contention that it "could not 'necessarily have deduced' the C. I. O.'s true purpose," the Board concluded that the employer "made no bona fide effort to evaluate all the evidence before it when it allegedly decided, despite the C. I. O.'s failure to deny the obvious facts, to believe that the C. I. O. was not acting in reprisal against the

clusion sought to be drawn from it is one of fact for the jury." *National Labor Relations Board v. Columbian Enameling and Stamping Co.*, 306 U. S. 292, 300.

<sup>85</sup> *National Labor Relations Board v. Pacific Greyhound Line, Inc.*, 91 F. 2d 458, 459 (C. A. 9), modified on other grounds, 303 U. S. 272.

complainants because of their anti-C. I. O. activity" (R. I, 79). The Board holds that the employer may not disregard the plain import of facts of which it is apprised and simulate a degree of credulity in the conduct of ordinary affairs to which experienced businessmen are not customarily addicted. It is familiar law that a person "has no right to shut his eyes or his ears to the inlet of information," and then claims in good faith that he is "without notice."<sup>86</sup>

In order to prevent disingenuous disavowal of actual knowledge, the Board places responsibility on the employer when the latter is in possession of facts affording a "reasonable basis for belief"<sup>87</sup> as to the contracting union's discriminatory purpose. The correctness of the Board's conclusion, in holding the employer responsible when it has knowledge of facts which would apprise a reasonable man of the contracting union's discriminatory purpose, is confirmed by Section 8 (a) (3) (B) of the Act, as amended. It provides that under a union-shop contract "no employer shall

<sup>86</sup> *Simmons Creek Coal Company v. Doran*, 142 U. S. 417, 437, quoting from Virginia Court of Appeals in *Burwell's Admr's v. Fauber*, 21 Gratt. 446, 463.

<sup>87</sup> *Matter of Westinghouse Electric Corp.*, 80 N. L. R. B., No. 143, 23 L. R. R. M. 1181, 1182 ("knew, or at least had a reasonable basis for belief"); *Matter of Owens-Illinois Glass Co.*, 80 N. L. R. B., No. 141, 23 L. R. R. M. 1191, 1192-1193 ("knows or has reason to believe"); *Matter of Basic Vegetable Products, Inc.*, 75 N. L. R. B. 815, 817 ("knowledge or good reason to believe").

justify any discrimination against an employee for nonmembership in a labor organization \* \* \* *if he has reasonable grounds for believing* that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.” [Emphasis supplied.] In like fashion, the final version of the Senate bill which had codified the Board’s interpretation of the proviso (*supra*, pp. 54–55) had provided that: “\* \* \* no employer shall justify any discrimination against an employee for nonmembership in a labor organization \* \* \* (C) *if he has reasonable grounds for believing* that membership was denied or terminated because of activity designed to secure a determination pursuant to section 9 (c) (1) (A), at a time when a question concerning representation may appropriately be raised.” [Emphasis supplied.]

A third basis of employer responsibility is the employer’s knowledge of facts sufficient to place a duty<sup>a</sup> of inquiry upon it which if pursued would disclose the contracting union’s discriminatory purpose.<sup>88</sup> Although this basis of

<sup>88</sup> *Matter of Lewis Meier & Company*, 73 N. L. R. B. 520, 521–522; *Matter of Pillsbury Mills, Inc.*, 74 N. L. R. B. 1113, 1116; *Matter of Durasteel Company*, 73 N. L. R. B. 941, 945; *Matter of Interstate Engineering Corporation*, 83 N. L. R. B., No. 16, 24 L. R. R. M. 1031, 1032–1033; *Matter of United Engineering Company*, 84 N. L. R. B., No. 10, 24 L. R. R. M. 1213.

employer knowledge is in no way involved in this case, its explanation is necessary because of the employer's contention that it shows the unreasonableness of the duty required of the employer (Br., pp. 30-31, 15).

An employer is not required before complying with a discharge demand under a closed-shop agreement to pursue any inquiry unless at the time of the request it is already in possession of information which demonstrates the likelihood that the agreement is being invoked for discriminatory purposes.\* Where such information is in possession, inquiry is to be made, as it is made in other fields, in accordance with "well-settled law that a party to a transaction, where his rights are liable to be injuriously affected by notice, cannot willfully shut his eyes to the means of knowledge which he knows are at hand, and thereby escape the consequences which would flow from the notice if it had actually been received; or in other words, the general rule is that knowledge of such facts and circumstances as are sufficient to put a party upon inquiry, and to show that if he had exercised due diligence he would have ascertained the truth of the case, is equivalent to actual notice of the matter in

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\* Facts and circumstances sufficient to require inquiry were deemed lacking in *Matter of Diamond T Motor Car Company*, 64 N. L. R. B. 1225, 1226, and in *Matter of Spicer Mfg. Corp.*, 70 N. L. R. B. 41, 42.

respect to which the inquiry ought to have been made." 99

In order to guard against the improvident commission of an unfair labor practice through compliance with a union's discharge request under a closed-shop contract, where the facts demonstrate discrimination, the employer is required to pursue an inquiry in a narrow, confined sphere. Thus, where the employer is in possession of information which demonstrates to it that the contracting union is invoking the closed-shop agreement for discriminatory purposes, and where nonpayment of dues is also offered in justification for the discharge request, the employer may ask the employees whether they have in fact offered to pay their dues. *Matter of Lewis Meier & Company*, 73 N. L. R. B. 520, 521-522. So, too, where discriminatory purpose is manifest, but where the employee's inability to work harmoniously with his fellow-workers is also suggested as the reason for the discharge request, the employer may inquire among the employees of the supposedly disgruntled crew as to the basis for the purported antagonism. *Matter of Pillsbury Mills, Inc.*, 74 N. L. R. B. 1113, 1116. By its nature, however, the area of inquiry is not susceptible to predetermination, its direction being necessarily dependent on the facts and circumstances giving rise to inquiry. But in no

<sup>99</sup> *The Lulu*, 10 Wall. 192, 201-202.

event does the limited scope of inquiry open to the employer contemplate that it be vested with investigatory powers, that it delve into the union's books and policies, or that it police the union's conduct of its internal affairs."

The choice is not between no inquiry and unlimited inquiry. The problem, rather, is one of defining a qualified inquiry in terms of an adjustment to be made between the conflicting interests of employee freedom to change representatives, employer freedom from onerous burdens, and union privacy. The course of inquiry may tangentially lead the employer into acts from which it would otherwise be barred by Section 8 (1) of the Act, as infringement upon self-organizational rights of employees, were it not for the justification afforded by the objective of the inquiry. The

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"The narrow sphere of inquiry contemplated is comparable to that envisaged under the final version of the Senate bill embodying the amendments to the Act which had provided that "no employer shall justify any discrimination against an employee for nonmembership in a labor organization \* \* \* (C) if he has reasonable grounds for believing that membership was denied or terminated because of activity designed to secure a determination pursuant to section 9 (c) (1) (A), at a time when a question concerning representation may appropriately be raised" (*supra*, pp. 54-55, 98). In referring to this provision, the Senate Report on the bill which became the Act, as amended, stated, "The tests provided by the amendment are based upon facts readily ascertainable and do not require the employer to inquire into the internal affairs of the union." S. Rep. No. 105, 80th Cong., 1st Sess., p. 20.

Board has weighed the competing values and determined that the good resulting from protecting freedom to change representatives outweighs the harm of intrusion into union privacy. As this Court stated in *National Labor Relations Board v. Stowe Spinning Company*, 336 U. S. 226, 231, "the Wagner Act 'left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms.' *Republic Aviation Corp. v. Labor Board*, \* \* \* 324 U. S., at 798. Sections 8 (1) and 8 (2)," and now Sections 8 (1) and 8 (3), "of the Act would seem to run into each other in the situation before us, were we to forget that the Board is the agency which weighs the relevance of factual data."

Apart from the question of the employer's knowledge of the contracting union's discriminatory purpose, the Board's rule requires that the employees' rival union activity, in order to be protected, must occur at a period during which it is appropriate to seek a redetermination of representatives. "In the interest of effectuating the policies of the Act by encouraging collective bargaining and stabilizing labor relations," the object of this limitation is to prevent undermining "the status of the existing bargaining representative in the middle of the contract term," without depriving employees of "an opportunity at an appro-

priate time to exercise their right to 'change their collective bargaining representative for the next contractual period' and to 'affiliate with and campaign for any union for the next period.'"<sup>92</sup> Stated otherwise, "Protection will not be given dual union activity where its purpose is to upset the existing contract status of the union."<sup>93</sup>

The period appropriate for advocacy of a rival union to displace the closed-shop contracting union normally coincides with the period when the Board in a representation proceeding would consider a test of the majority status of any existing exclusive representative to be timely.<sup>94</sup> Contrary to intimations in the employer's brief (pp. 24, 48, 49-50); the rule pertaining to the ascertainment of the period appropriate for the re-determination of representatives was not evolved as an incident of the effect to be given a closed-shop agreement when it conflicts with the em-

<sup>92</sup> *Matter of Southwestern Portland Cement Company*, 65 N. L. R. B. 1, 8.

<sup>93</sup> *Matter of Durasteel Company*, 73 N. L. R. B. 941, 944; See also, *National Labor Relations Board v. Public Service Transport*, 24 L. R. R. M. 2466, 2471 (C. A. 3). Protection has been denied for this reason in *Matter of Southwestern Portland Cement Company*, 65 N. L. R. B. 1; *Matter of Revere Copper and Brass, Inc.*, 80 N. L. R. B., No. 220, 23 L. R. R. M. 1244; *Matter of General Instrument Corp.*, 82 N. L. R. B., No. 100, 23 L. R. R. M. 1633.

<sup>94</sup> *Matter of Geraldine Novelty Company, Inc.*, 74 N. L. R. B. 1503, 1504, enforced, 173 F. 2d 14, 16-18 (C. A. 2); *Matter of Westinghouse Electric Corp.*, 80 N. L. R. B., No. 143, sl. op. pp. 17-19, 23 L. R. R. M. 1181.

ployees' right to change representatives, but it was developed as part of the larger problem of ascertaining to what extent any collective-bargaining agreement, whether closed shop or not, should preclude a redetermination of representatives. The rule was adopted and applied from the very beginning of the Board's administration of its election machinery for resolving representation contests without regard to whether or not a closed-shop agreement was involved. National Labor Relations Board, Third Annual Report (Govt. Print. Off., 1939), pp. 134-136, and cases cited; National Labor Relations Board, Fourth Annual Report (Govt. Print. Off., 1940), p. 75, and cases cited; *National Labor Relations Board v. Geraldine Novelty Co.*, 173 F. 2d 14, 16-17 (C. A. 2). The rule, developed as part of the Board's representation machinery, antedated the *Ansley Radio* case (*supra*, pp. 30-31) in which, in an unfair labor practice proceeding, the Board's decision mentioned the pertinence of the rule to the question of the lawfulness of discharging employees for advocating a change of representatives during the term of a closed-shop agreement. "This administrative rule should logically be applied in complaint cases no less than in representation cases". *National Labor Relations Board v. Geraldine Novelty Co.*, 173 F. 2d 14, 18 (C. A. 2).

The meaning and measurement of the appropriate period may best be illustrated in relation to its determination in the present case. The

Board found the closed-shop agreement to have been validly entered into in conformity with the proviso to Section 8 (3) of the Act (R. I, 69). The Board concluded, however, that, by virtue of the indefinite term of the contract which had run for more than a year, the employees undertook to oust the C. I. O. as their bargaining representative at a period during which it was appropriate to seek a redetermination of representatives (R. I, 75, 54-55). As the Board succinctly stated, in directing the election to resolve the question of representation raised by the A. F. L. as a result of the rival union activity in this case: "Neither the original nor supplemental contracts contain a definite termination date. In view of its indefinite duration and the fact that it has been in force for at least 1 year, we find that the contract and extensions thereof, do not constitute a bar to a determination of representatives" (R. III, 802, 799-805, R. II, 552). Upon this aspect of the case, there is no dispute as to the soundness of the Board's conclusion that the rival unionism of the A. F. L. adherents occurred during a protected period.

Underlying the Board's conclusion is the Board's well-settled rule concerning the length of time during which a union is immune from challenge by virtue of an existing collective-bargaining agreement which it has negotiated and administers as the exclusive representative. In determining whether a validly existing agreement

between an employer and a union precludes an election for the purpose of resolving a disputed question of representation, the Board balances the interest in industrial stability, resulting from affording a period of quiet enjoyment to an agreement arrived at through collective bargaining, with the need of affording to employees reasonable intervals at which they may oust or reaffirm their bargaining representatives.<sup>65</sup> In making that equation, it is the Board's settled practice, with certain presently immaterial refinements,<sup>66</sup> not to disturb a contract of reasonable duration containing a definite termination date until the approach of the expiration of the contract term.<sup>67</sup> Where, as here, the collective-bargaining agreement runs for an indefinite period,<sup>68</sup> the Board's rule at the time this case was decided

<sup>65</sup> National Labor Relations Board, Twelfth Annual Report (Gov't Print. Off. 1948), p. 9; National Labor Relations Board, Thirteenth Annual Report (Gov't. Print. Off. 1949), p. 29.

<sup>66</sup> Twelfth Annual Report, at pp. 9-14; Thirteenth Annual Report, at pp. 29-32.

<sup>67</sup> Twelfth Annual Report, at p. 9; Thirteenth Annual Report, at p. 29.

<sup>68</sup> Contracts of indefinite duration are customary in collective bargaining. See, e. g., *Matter of Irwin Auger Bit Company*, 68 N. L. R. B. 447; *Matter of Fairbanks, Morse & Co.*, 66 N. L. R. B. 673; *Matter of Joseph Lerner*, 63 N. L. R. B. 810; *Matter of Consolidated Vultee Aircraft Corporation*, 71 N. L. R. B. 1350, 1351-1352; *Matter of Duquesne Light Company*, 71 N. L. R. B. 336; *Matter of Waterfront Employers Asso.*, 71 N. L. R. B. 80, 88; *Matter of the Truiler Company of America*, 51 N. L. R. B. 1106; *Matter of Miami Copper Co.*, 71 N. L. R. B. 34; *Matter of Swift and Company*,

required that the union's immunity from challenge end after the contract has been in effect for one year," and thereafter whenever a question concerning representation arises an election for the purpose of resolving it is timely.<sup>1</sup>

Writing with specific reference to contracts of indefinite duration, but adverting to the underlying considerations generally applicable in determining whether an existing contract of whatever duration bars a present representation contest, the Board has stated (*Matter of Trailer Company*, 51 N. L. R. B. 1106, 1109-1110, 1111):

The Board has always held to the view \* \* \* that its discretion with respect to the effect to be given to a collective bargaining contract in a representation case is limited by the necessity of balancing two separate interests of employees and society which the Act was clearly designed to foster and protect: namely, the interest in such stability as is essential to encourage "the practice and procedure of collective bar-

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71 N. L. R. B. 727, 728; *Matter of Thomas Truck and Caster Co.*, 72 N. L. R. B. 847; *Matter of Lewis Meier & Co.*, 73 N. L. R. B. 520.

"Recently, "in the interest of promoting greater stability in industrial relations," the Board has extended to two years the period of immunity "accorded to long-term contracts and contracts of indefinite duration." *Matter of Puritan Ice Co.*, 74 N. L. R. B. 1311, 1313-1314, 20 L. R. R. M. 1268; *Matter of Filtrol Corp.*, 74 N. L. R. B. 1307; Twelfth Annual Report, at p. 10.

<sup>1</sup> National Labor Relations Board, Eleventh Annual Report (Gov't. Print. Off. 1947), p. 14; cf. Twelfth Annual Report, p. 10.

gaining," and the sometimes conflicting interest in the freedom of employees to select and change their representatives at will. In weighing these conflicting interests, the Board has developed its doctrine that a contract will bar an investigation to determine representatives for a definite and reasonable period, but no longer.

\* \* \* \* \*

There is nothing that is more likely to breed discontent among the employees or make for irresponsible union leadership than a policy which deprives workers of any voice in the conduct or identity of their representatives for an unreasonable length of time. Perhaps an appearance of stability may be achieved by a contract of extended duration but . . . ephemeral quality [characterizes] \* \* \* such stability \* \* \* We believe that to deny to employees the opportunity to select new bargaining representatives after a reasonable time serves to aggravate rather than minimize discord and to remove the foundation upon which stability may be based.

The basic validity of this accommodation of competing values was recognized by this Court in *Franks Bros. Company v. National Labor Relations Board*, 321 U. S. 702, 705-706. There this Court stated that the designation of a union as bargaining representative "is not intended to fix a permanent bargaining relationship without regard to new situations that may develop. \* \* \*

But \* \* \* a bargaining relationship once right-fully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed. \* \* \* After such a reasonable period the Board may, in a proper proceeding and upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships.”

The regular intervals so established for timely representation contests thus afford the appropriate periods during which employees may undertake advocacy of a rival union to displace a contracting union which has a closed-shop agreement. When, in the instant case, the A. F. L. adherents undertook activities looking toward the displacement of the C. I. O. as their bargaining representative, their rival unionism occurred more than four years after execution of the contract of indefinite duration (*supra*, pp. 4-8) and therefore during a time when it was appropriate to seek a change of representatives. As the court

<sup>2</sup> See also, *National Labor Relations Board v. Geraldine Norelty Co.*, 173 F. 2d 14, 16-18 (C. A. 2); *National Labor Relations Board v. Century Oxford Manufacturing Corporation*, 140 F. 2d 541, 542 (C. A. 2), certiorari denied, 323 U. S. 714; *National Labor Relations Board v. Appalachian Electric Power Co.*, 140 F. 2d 217, 221-222 (C. A. 4); *National Labor Relations Board v. Botany Worsted Mills*, 133 F. 2d 876, 881-882 (C. A. 3); *National Labor Relations Board v. Blair Quarries, Inc.*, 152 F. 2d 25 (C. A. 4); *National Labor Relations Board v. Worcester Woolen Mills Corp.*, 170 F. 2d 13, 17 (C. A. 1), certiorari denied, 336 U. S. 903; *National Labor Relations Board v. Gatke Corp.*, 162 F. 2d 252 (C. A. 7).

below held, in an earlier case, the employer could not knowingly during such a period, at the behest of the incumbent, invoke the closed-shop agreement to place under a pall "the freest of open advocacy of the divergent views of the voters." Whether the employees are ultimately successful through their electioneering in effecting a change is immaterial, since the very object of a protected period is to afford employees freedom from discrimination whether in victory or defeat. Uncoerced resort to the franchise cannot depend on success in its exercise.

#### CONCLUSION

For the reasons stated, it is respectfully submitted that the decision below should be affirmed.

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NOVEMBER 1949.

<sup>1</sup> *Local No. 2880 v. National Labor Relations Board*, 158 F.2d 365, 369.

<sup>2</sup> *Matter of Lewis Meier & Company*, 73 N. L. R. B. 520, 534, set aside, 21 L. R. R. M. 2093 (C. A. 7).

## APPENDIX

The relevant provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are as follows:

### RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the

employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

\* \* \* \* \*

#### REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

\* \* \* \* \*

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

\* \* \* \* \*

#### PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. \* \* \*

(c) \* \* \* If upon all the testimony taken the Board shall be of the opinion that

any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

\* \* \* \* \*

(e) The Board shall have power to petition any circuit court of appeals of the United States \* \* \* wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of ex-

traordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. \* \* \*

The relevant provisions of the Labor Management Relations Act (61 Stat. 136, 29 U. S. C., Supp. II, sec. 141, *et seq.*), are as follows:

\* \* \* \* \*

TITLE I—AMENDMENT OF NATIONAL LABOR  
RELATIONS ACT

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

\* \* \* \* \*

“RIGHTS OF EMPLOYEES

“SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

“UNFAIR LABOR PRACTICES

“SEC. 8. (a) It shall be an unfair labor practice for an employer—

\* \* \* \* \*

“(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United

States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

“ (b) It shall be an unfair labor practice for a labor organization or its agents—

“(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

\* \* \* \*

#### “REPRESENTATIVES AND ELECTIONS

“SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

\* \* \* \*

“(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

“(A) by an employee or group of employees or any individual or labor organiza-

tion acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

“(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

\* \* \* \* \*

“(e) (1) Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9 (a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organiza-

tion as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

“(2) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3) (ii), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit, and shall certify the results thereof to such labor organization and to the employer.

\* \* \* \* \*

“PREVENTION OF UNFAIR LABOR PRACTICES

\* \* \* \* \*

“[SEC. 10] (e) The Board shall have power to petition any circuit court of appeals of the United States \* \* \* wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as

it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

\* \* \* \* \*

#### EFFECTIVE DATE OF CERTAIN CHANGES

SEC. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto, and the provisions of section 8 (a) (3) and section 8 (b) (2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.